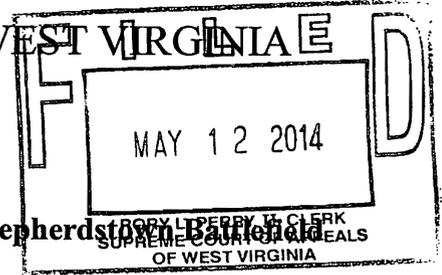


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Gary L. Capriotti, Edward R. Moore, Edward E. Dunleavy and Shepherdstown Battlefield  
Preservation Assoc., Inc.**  
Petitioners

v.

Supreme Court Docket No. **13-1243**

**Jefferson County Planning Commission**, a public body,  
Respondent

and

**Farm Away Farms, LLC**,  
Respondent

Appeal from the Honorable **David H. Sanders**, Judge, 23<sup>rd</sup> Circuit

-----  
**Respondent's Brief**  
-----

Respectfully Submitted,

Jefferson County Planning Commission, by counsel,

A handwritten signature in black ink, appearing to read "SHV Groh", written over a horizontal line.

Stephen V. Groh  
Assistant Prosecuting Attorney  
Post Office Box 729  
Charles Town, West Virginia 25414  
West Virginia State Bar No. 6831  
sgroh@JeffersonCountyWV.org  
304-728-3243 Phone  
304-728-3293 Fax

**Table of Contents**

Table of Authorities..... 3, 4

Statement Regarding Oral Argument..... 5

Statement of the Case..... 6

Standard of Review..... 10

Summary of Argument..... 11

Argument..... 14

Conclusion..... 27

Certificate of Service ..... 30

## Table of Authorities

### Case Law:

<u>Aetna Casualty &amp; Surety Co. v Federal Insurance Co. of New York,</u> 148 W.Va. 160, 133 S.E.2d 770 (1963)	14
<u>Burgress v. Moore,</u> 224 W.Va. 291 685 S.E.2d 685 (2009).	18, 19
<u>Committee on Legal Ethics of the West Virginia State Bar v. Blair,</u> 174 W.Va. 494, 327 S.E.2d 671(1984)	12, 16
<u>Hubbard v. State Farm Indemnity Co.,</u> 213 W.Va. 542; 584 S.E.2d 176(2003)	10, 14, 15, 25
<u>Jefferson County Planning Com'n v. Far Away Farms, LLC</u> 2009 WL 3617749 N.D.W.Va. (2009)	6
<u>Far Away Farms, LLC v. Jefferson County Bd. Of Zoning Appeals,</u> 222 W.Va. 252 (2008)	6
<u>Lawyer Disciplinary Board v. Cunningham,</u> 195 W.Va. 27 (1995)	17, 22
<u>Lawyer Disciplinary Board v Turgeon,</u> 210 W.Va. 181, 557 S.E.2d 235(2000)	17, 22
<u>McComas v. Board of Ed.,</u> 197 W.Va. 188, 475 S.E.2d 280 (1980)	24
<u>Peters v. County Com'n of Wood County,</u> 205 W.Va. 481, 519 S.E.2d 179 (1999)	5, 12,22-25
<u>Shenandoah Sales &amp; Service, Inc. v. Assessor of Jefferson County,</u> 228 W.Va. 762, 724 S.E.2d 733 (2012)	21
<u>State v. Burton,</u> 163 W.Va. 40, 254 S.E.2d 129(1979)	16, 24
<u>State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.</u> 194 W.Va. 770, 461 S.E.2d 516 (1995)	15, 28
<u>State ex rel Quelch v. Daugherty</u> 172 W.Va. 422 (1983)	12, 16, 21
<u>Sticklen v. Kittle,</u> 168 W.Va. 147, 287 S.E.2d 148 (1981)	15, 28

**Statutes and Rules of Court:**

W.V. Code §6-9A-3	18
W.V. Code §6-9A-4(b) (11) & (12)	5, 8, 11, 16, 20
W.V. Code §6-9A-5	18
W.V. Code §6-9A-7(a)	9
Rule 8 WVRCP	15, 28
WVRPC 1.1	17, 22
WVRPC 1.2	17, 22
WVRPC 1.3	17, 22
WVRPC 1.4	17, 22
WVRPC 1.6	16, 17, 22, 25

**Other Source Material:**

Samuel Johnson, <u>The Life of Samuel Johnson, LL.D. Vol. III</u>	24
---	----

## STATEMENT REGARDING ORAL ARGUMENT

This case involves issues of fundamental public importance concerning a government attorney's ability to fulfill her obligations under the West Virginia Rules of Professional Conduct in the context of settlement negotiations of on-going litigation and avoid sanctions for allegedly violating the West Virginia Open Meetings Act W. Va. Code § 6-9A-1, et seq. The ruling of the trial court also addressed and resolved an important issue of law: the conflict between this Court's holding in Peters v. County Com'n of Wood County, 205 W.Va. 481, 489, 519 S.E.2d 179, 187 (1999) which recognized a common law exception to the Open Meetings Act for attorney-client privilege and subsequent legislative amendments to the Act which provide two express exceptions relating to attorney-client privilege (W.V. Code §6-9A-4(b)(11) & (12)). It is therefore appropriate for Rule 20 Argument.

## Statement of the Case

The West Virginia Rules of Professional Conduct place a mandatory professional duty upon an attorney to promptly inform her client of any offer to settle pending litigation.

In 2011, the Jefferson County Planning Commission and Far Away Farms, LLC<sup>1</sup> (hereinafter “FAF”) were engaged in on-going litigation with regard to decision of the Planning Commission relating to FAF’s real property. On the afternoon of July 26<sup>th</sup>, 2011, counsel for the Planning Commission received a settlement offer from FAF concerning on-going litigation between them. That evening, during the previously published agenda item for “Report and Advice from Legal Counsel” the Planning Commission voted to go into executive session to meet with their counsel. [Appendix 292, 295] In executive session, counsel fulfilled her professional obligations and presented the settlement offer and provided confidential legal advice about the same. The Planning Commission left executive session and voted in public session to authorize counsel to present a counter-offer to the proposed settlement. [Appendix 293] In the days after July 26<sup>th</sup>, 2011, the parties ultimately reached a settlement agreement and presented the same to the Circuit Court for consideration.<sup>2</sup>

---

<sup>1</sup> Yes, the same “Far Away Farms” project which has been the subject of numerous actions before this Court and in federal courts. A succinct summary of the history of past litigation can be found at Jefferson County Planning Com'n v. Far Away Farms, LLC 2009 WL 3617749 N.D.W.Va. (2009) in which Chief United States District Judge Bailey characterized the federal litigation as nothing more than a “collateral attack of the judgment in Far Away Farms, LLC v. Jefferson County Bd. Of Zoning Appeals, 222 W.Va. 252 (2008).”

<sup>2</sup> In the Complaint Capriotti erroneously claimed the settlement was agreed to on July 26<sup>th</sup>, 2011. [Appendix page 379-281 items 20, 25, 32, 35-37] Further, in the interlocutory order at issue which was prepared by Capriotti [Appendix 797], the Court also erroneously found that the settlement was agreed to on July 26<sup>th</sup>, 2011, [Appendix page 789 item 5] Furthermore, this factual error was alleged in the Planning Commission’s successful motion to reconsider, Capriotti now agrees in their brief at page 17 that the settlement was concluded on August 3<sup>rd</sup>,

Nearby land owners (the instant Petitioners, hereinafter collectively “Capriotti”) filed two actions in an attempt to thwart the FAF settlement. First, Capriotti sought a Writ of Prohibition. This Court denied the writ. (WVSCT No. 11-1470) Second, Capriotti filed the instant action which essentially --and erroneously-- claims the Open Meetings Act (Hereinafter “OMA”) bars an attorney from promptly and confidentially informing their client about settlement offers.

Counsel for the Planning Commission did not receive notice from the Court that the settlement had been accepted by the Court until after the next scheduled meeting of the Planning Commission. The Planning Commission entered the settlement order into its minutes a reasonable time after it was received from the Court.<sup>3</sup> Capriotti received direct notice of the settlement from the circuit clerk on August 8<sup>th</sup>, 2011. [See Appendix 278]

After a February 10<sup>th</sup>, 2012, hearing, the Court denied the Planning Commission’s motion to dismiss. The Court scheduled a final evidentiary hearing. Cross-motions for summary judgment were filed.<sup>4</sup> Prior to the scheduled evidentiary hearing, the Circuit Court erroneously

---

2011, not on July 26<sup>th</sup>, 2011. Thus, Capriotti has conceded that main critical allegation of the complaint is false and thus rendering the entire complaint moot.

<sup>3</sup> The Planning Commission did place the settlement into the official record of the Planning Commission (see attached affidavit from Director of Planning and Zoning), however, the issue is not properly before this Court because it was property before the trial court. The complaint failed to raise any issue with regard to failure to report in “a reasonable time thereafter” as required by OMA Exception 11. The Planning Commission raised just this issue in its motion to dismiss [Appendix page 304-306] Capriotti concedes this in page 6 of their brief. Capriotti never amended the complaint and it is too late to attempt to create “material” issues never raised in the complaint. Furthermore, Due Process demands a defendant have a fair opportunity to litigate any claim and the Defendant should not be required to respond nor present evidence on issues not raised in a complaint.

<sup>4</sup> The legal arguments of the Planning Commission relating to the exceptions to the OMA and counsel’s obligations under the WVRPC were both argued at the February 12, 2011, hearing [Appendix pages 12-24 (Transcript)], upon the Planning Commission’s motion to dismiss [Appendix page 317] and in the motion for summary judgment [Appendix page 543]

adopted Capriotti's proposed order granting partial summary judgment without further hearing of any kind.

The trial court's order stated that it was "final and appealable" and the Planning Commission filed an immediate appeal. Capriotti file a motion to dismiss the appeal claiming "the order is not final and does not resolve all issue before the circuit court." [Motion to Dismiss Supreme Court Docket No. 12-0846] This Court granted Capriotti's motion to dismiss agreeing order at issue was interlocutory. (No 12-0846).

After the initial appeal was rejected as pre-mature, the Planning Commission filed a motion to re-consider. The circuit court, after due consideration, exercised its broad discretion concerning interlocutory orders and reversed its ruling. The trial court found that it had erroneously adopted Capriotti's position that the Open Meetings Act bars counsel from promptly communicating a settlement offer to their client and prevents counsel from giving timely confidential legal advice about a settlement offer. Upon reconsideration, the trial court agreed an attorney for a public body cannot ignore her professional obligations and withhold crucial information about a proposed settlement from her client. [Appendix 1238-1245] Instead, in the context of on-going litigation, counsel must promptly and confidentially inform her client of a settlement offer. Upon reconsideration, the trial court correctly found that the OMA provides two exceptions applicable to the instant situation. W.V.Code §6-9A-4(b)(11) & (12). The trial court further found that following the language of OMA Exception 12 was completely consistent with counsel's obligations under the West Virginia Rules of Professional Conduct.

At its heart, the trial court's initial legal errors stripped the Planning Commission of the right to timely and confidential legal advice. To follow the trial court's initial order, counsel

would have had to ignore her professional obligations, to conceal a settlement offer from her client, to publically breach client confidentiality and to deny timely legal advice to her client. Furthermore, since violation of the OMA can be a misdemeanor, W.V. Code §6-9A-7(a), the trial court's initial erroneous interpretation left counsel with a stark choice: intentionally shirk her professional responsibilities or commit a crime.

In the context of on-going civil litigation, the applicable exceptions to the OMA must be given their plain meaning and otherwise yield to the Rules of Professional Conduct adopted by this Court to safe guard the practice of law. Thus, the trial court appropriately exercised its inherent equitable power with respect to interlocutory judgments when it correctly found cause to set aside its initial partial summary judgment order. .

## Standard of Review

The Petitioners contend that the trial court erred when it reversed its order granting partial summary judgment to Capriotti. [See Notice of Appeal Assignments of error 2 and Assignment of Error 2 in Petitioners Brief] When setting aside the partial summary judgment, the trial court cited WVRPC 60(b), but the Rule 60(b) standard does not apply to a trial court's review of interlocutory orders. This Court clearly held in Hubbard v. State Farm that "when a party seeks to have a circuit court reconsider [its partial summary judgment] order prior to entry of a final judgment disposing of the entire case, the interlocutory order should **not** be reviewed under Rule 60(b) of the West Virginia Rules of Civil Procedure." Hubbard v. State Farm Indemnity Co., 213 W.Va. 542, 551, 584 S.E.2d 176, 185 (2003) (Emphasis added)

With respect to interlocutory orders such as the one at issue herein, the Hubbard Court adopted a highly deferential abuse of discretion standard when it held "the circuit court may rule on the merits of the motions for reconsideration in the light of the broad authority it possesses under its inherent power to revisit interlocutory orders rather than the limited authority granted under Rule 60(b). 213 W.Va. at 186, 584 S.E.2d at 552. This Court further described the circuit courts authority in such situations as "**virtually unbridled discretion.**" 213 W.Va. at 186, 584 S.E.2d at 552. Specifically, the trial court possesses "the inherent procedural power to reconsider, rescind or modify an interlocutory order for cause seen by it to be sufficient." 213 W.Va. at 185, 584 S.E.2d at 551.

Thus, the proper standard of review is: Did the trial court abuse its 'virtually unbridled' discretion when it found sufficient cause to reverse partial summary judgment.

## Summary of Argument

- I. The trial court did not abuse its discretion when it reversed its prior interlocutory summary judgment order since the trial Court's prior order (drafted by the Petitioner) wrongly concluded the Planning Commission "accepted" a settlement offer on July 26<sup>th</sup>, 2011, when the time-stamped fax created a genuine issue of fact that Planning Commission did not 'accept' a settlement but rather rejected it and counter-offered.
  
- II. The trial court did not abuse its discretion when it set aside the interlocutory partial summary judgment order based upon a re-consideration of the applicable law. In exercising its discretion the trial court determined it had initially misapplied the law. The trial court correctly exercised its discretion when it determined that Planning Commission counsel did not violate the OMA when she promptly informed its client of a settlement offer received immediately prior to a scheduled Planning Commission meeting. The trial court's determination that legal error required a reversal constituted good cause to set aside the partial summary judgment. The following legal conclusions support the trial court finding:
  - a. When counsel received an offer to settle on-going litigation hours before a scheduled meeting of the Planning Commission, the West Virginia Rules of Professional Conduct required her to promptly and confidentially inform the Planning Commission about the settlement offer.
  - b. The OMA expressly provides an Exception for confidential legal advice found W.V. Code §6-9A-4(b)(12)(Hereinafter "Exception 12"). Exception 12 allows counsel to present a settlement offer to a public body promptly and confidentially.

- c. The plain language concerning the proper application of OMA exceptions found in the other sections of the OMA support the circuit court's decision to set aside its initial order.
- d. The common law Attorney-Client privilege exception recognized by this Court in Peters v. County Com'n of Wood County, 205 W.Va. 481, 489 (1999) has been superseded by subsequent amendments to the Open Meetings Act. W.V. Code §6-9A-4(b)(11) & (12)(Hereinafter "Exceptions 11 and 12.") In addition, Peters is distinguishable from the instant facts as Peters did not involve on-going litigation which required counsel to promptly and confidentially inform a client of a settlement offer.
- e. Constitutional Separation of Powers concerns trump the requirements of the Open Meetings Act with respect to the professional obligations of counsel during active litigation. This Court adopted the West Virginia Rules of Professional Conduct which require counsel to promptly and confidentially inform a client of an offer to settle on-going litigation. Assuming for the sake of argument the OMA statute actually conflicts with the Rules of Professional Conduct, the Rules adopted by this Court regulating the practice of law override any act of the Legislature. See, e.g., State ex rel Quelch v. Daugherty 172 W.Va. 422 (1983)(Supreme Court has sole authority to regulate and discipline the practice of law). This Court is "the final arbiter of legal ethics." Syl. Pt. 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671(1984).

III. The trial court never reached the remedy phase and never concluded the “violation” was *de minimis*. Therefore, the trial court committed no error of any kind with respect to this issue.

## ARGUMENT

### I. **Genuine Issues of Material Fact Did Exist Which Gave the Trial Court Cause to Set Aside Its Initial Order of Partial Summary Judgment.**

“A motion for summary judgment should be granted only when it is clear there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, Aetna Casualty & Surety Co. v Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963) In its motion to reconsider, the Planning Commission correctly demonstrated to the trial court that a genuine issue of material fact existed<sup>5</sup> with respect to the trial courts initial order granting partial summary judgment. Specifically, the trial court found that the Planning Commission entered into a settlement at the July 26<sup>th</sup>, 2011, meeting. [Appendix 789 item 5]. In setting aside the summary judgment order the trial court found “the Respondent has persuasively argued in its motion that a genuine issue of material fact exists as to when the settlement was concluded” [Appendix 1244]

When setting aside the partial summary judgment, the trial court cited WVRPC 60(b), [Appendix page 1240-49] However, the Rule 60(b) standard does not apply to a trial court’s review of interlocutory orders. Addressing a civil case in which partial summary judgment was entered, this Court clearly held in Hubbard v. State Farm that “when a party seeks to have a circuit court reconsider [its partial summary judgment] order prior to entry of a final judgment disposing of the entire case, the interlocutory order should **not** be reviewed under Rule 60(b) of the West Virginia Rules of Civil Procedure.” Hubbard v. State Farm Indemnity Co., 213 W.Va. 542, 551, 584 S.E.2d 176, 185 (2003) (Emphasis added)

---

<sup>5</sup> Capriotti now agrees in their brief-- at page 17-- that the settlement was concluded on August 3<sup>rd</sup>, 2011, not on July 26<sup>th</sup>, 2011, so genuine issue does NOT NOW exist with respect to this issue.

With respect to interlocutory orders such as the one as issue herein, the Hubbard Court adopted a highly deferential abuse of discretion standard when it held “the circuit court may rule on the merits of the motions for reconsideration in the light of the broad authority it possesses under its inherent power to revisit interlocutory orders rather than the limited authority granted under Rule 60(b). 213 W.Va. at 186, 584 S.E.2d at 552. This Court further described the circuit courts authority in such situations as “**virtually unbridled discretion.**” 213 W.Va. at 186, 584 S.E.2d at 552. Specifically, the trial court possesses “the inherent procedural power to reconsider, rescind or modify an interlocutory order for cause seen by it to be sufficient.” 213 W.Va. at 185, 584 S.E.2d at 551. Thus, the proper standard of review is: whether the trial court abused its ‘virtually unbridled’ discretion when it found sufficient cause to reverse partial summary judgment.

Applying the highly deferential abuse of ‘virtually unbridled’ discretion standard to the interlocutory order at issue, the trial court certainly had sufficient cause to set aside its initial partial summary judgment order because at the time a genuine issue of material fact as to the date the settlement concluded existed. Therefore, the trial court did not abuse its discretion to so find and set aside partial summary judgment.<sup>6</sup>

---

<sup>6</sup> While not listed as an error in the notice of appeal or in the Assignments of Error, Capriotti attempts to raise a new factual issue never raised in the complaint: the timeliness of reporting of a settlement on a date NOT alleged in the complaint. The Complaint was never amended.

The Planning Commission cannot reasonably be expected to respond to issues not raised in the complaint. “The plaintiff’s attorney must know every essential element of his cause of action and must state it in the complaint.” Sticklen v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981) See also, State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc. 194 W.Va. 770, 461 S.E.2d 516 (1995) (“The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.”) Since the complaint alleged that the settlement was concluded on July 26<sup>th</sup>, 2011, and Capriotti concedes it was concluded at another time the issues raised in the complaint is moot. The 23 page Capriotti civil complaint

## **II. The Trial Court Correctly Set Aside Partial Summary Judgment Order Which Ignored Legal Exceptions to the OMA**

### **A. The Trial Court Initially Ignored the OMA Exception for Confidential Advice and that Error Justified Setting Aside Partial Summary Judgment**

The trial court initially erred when it ignored the express OMA Exception for confidential legal advice found in WV Code §6-9A-4(b)(12)(Hereinafter “Exception 12”). Exception 12 to the OMA allows a public body “to discuss any matter which by express provision or federal law or state law or rule of court is rendered confidential.” WV Code §6-9A-4(b)(12)

The West Virginia Rules of Professional Conduct, duly adopted by this Court, apply to all those practicing law in West Virginia and carry the force of law. WVRPC. See, State ex rel Quelch v. Daugherty 172 W.Va. 422 (1983)(Supreme Court has sole authority to regulate and discipline the practice of law). This Court is “the final arbiter of legal ethics.” Syl. Pt. 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671(1984)

The Rules of Professional Conduct require that lawyers provide confidential advice to their clients. WVRPC 1.6; State v. Burton, 163 W.Va. 40, 254 S.E.2d 129(1979)(an essential element of attorney-client privilege “the communication between the attorney and client must be intended to be confidential.”) This Court has held that Rule 1.6 of the West Virginia Rules of Professional Conduct require an attorney to guard “all information relating to the representation

---

focused entirely upon notice and agenda issues at the July 26<sup>th</sup>, 2011 meeting and events leading up to the meeting.[Appendix 275-283; See also, Planning Commission Motion to Dismiss, Appendix 301]

of a client” and publically admonished the Attorney General for failing to follow this Rule.

Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995)

In addition, WVRPC 1.4 requires an attorney to promptly inform a client about a settlement offer. See generally, Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27 (1995)(Attorney violated Rules 1.1, 1.2, 1.3, and 1.4 when attorney failed to inform client of settlement offer.); Lawyer Disciplinary Board v Turgeon, 210 W.Va. 181, 557 S.E.2d 235(2000)(Attorney violated WVRPC “where attorney failed to convey plea offer.”)

As duly enacted Rules of this Court, the Rules of Professional Conduct clearly fall under Exception 12 to the OMA. Since the Rules of Professional Conduct require both prompt the presentment of offers to compromise combined with a duty of confidentiality, an attorney has professional responsibility which squarely triggers Exception 12.

In the instant case, an offer to settle on-going litigation, received hours before a previously scheduled meeting of the Planning Commission, properly triggered Exception 12. The trial court’s initial order required counsel wait to give legal advice until counsel had publically disclosed the terms of a settlement published agenda of the next scheduled meeting. This initial order wrongly required counsel both to violate client confidentiality and to withhold vital information about a settlement offer. [See Appendix page 373]

The trial court erred when it initially found that the Planning Commission’s attorney violated the OMA by promptly and confidentially informing its client of a settlement offer because the trial court failed to give force and effect to the clear requirements of Exception 12. The clear and unambiguous of Exception 12 language was not subject to interpretation by the trial court but

should be given full force and effect. Syl.pt. 4, Burgress v. Moore, 224 W.Va. 291 685 S.E.2d 685 (2009).

The trial court's erroneous initial ruling ignored Exception 12 and placed counsel in an impossible ethical dilemma: withhold critical settlement information from a client in violation of counsel's duty under the West Virginia Rules of Professional Conduct or violate (the trial court's initial view of) the OMA.

The trial court correctly set aside its initial order because the Open Meetings Act agenda requirements cannot trump counsel's ethical obligation to promptly inform a client about a settlement offer.

**B. The Trial Court Initially Disregarded Statutory Language in Surrounding Sections Which Place Exceptions 11 and 12 Outside of the Notice and Agenda Requirements of the OMA and that Error Justified Setting Aside Partial Summary Judgment**

An examination of the clear language of related sections of the OMA, which involve agenda, notice and reporting of minutes, supports the Planning Commissions acting pursuant to the "Exceptions" provided under WV Code §6-9A-4 without regard to inapplicable agenda or minutes requirements.

OMA Section 3, titled "Proceedings to be open; public notice of meetings," states: "Except as expressly and specifically provided by law . . . and **except as provided for in section four of this article**, all meetings of any governing body shall be open to the public." W.V. Code §6-9A-3. The section titled "Minutes" states that "**subject to the exceptions set forth in section four**

**of this article**, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting.” W.V. Code §6-9A-5.

Both sections, by their clear language, do not apply to proceedings which qualify under section four, the “Exceptions” section of the OMA. W.V. Code §6-9A-4. This statutory scheme follows the plain meaning of the word “exception” which Black’s Law Dictionary defines as “a provision in a statute exempting certain persons or conduct from the statute’s operation.”

Even though the notice and agenda requirement by their very language do not apply to action taken pursuant to 6-9A-4 Exception, the Planning Commission contends an examination of the minutes of the July 26<sup>th</sup>, 2011, meeting show voluntary good faith efforts to keep the public informed. The minutes show the agenda item “Legal advice and report from legal counsel” and report the motion “Mr. Smith moved to go into executive session to discuss legal matters” [Appendix page 292 and 295]<sup>7</sup> If Exceptions 11 and 12 did not exempt the Planning Commission from the OMA in the context of prompt consideration an offer to settle on-going litigation, the agenda item and the motion would have satisfied the OMA. Thus, under the facts as presented in the agenda of July 26<sup>th</sup>, the trial court erred in its initial partial summary judgment order when it ignored Exceptions 11 & 12 and imposed notice, agenda and minutes requirements. [See Appendix pages 791-796]

---

<sup>7</sup> Furthermore, the Planning Commission keeps a comprehensive on-line record of all meetings, agendas, minutes and meeting packet materials. Agenda notices in general and the agenda of the July 26<sup>th</sup>, 2011, meeting specifically state: “Our website is [www.jeffersoncountywv.org](http://www.jeffersoncountywv.org). Minutes and video recordings of past meetings, Subdivision Regulations, Zoning Ordinance and Comprehensive Plan can be found at the website. The office has a file on each project as well as aerial photos of the county. Minutes and audio recordings of older meetings not on the website are available for review in the office.” Far from engaging in “intentionally secretive conduct” [Appendix page 281] the Planning Commission provides comprehensive transparency to matters not covered by attorney-client privilege.

This Court has clearly held that “clear and unambiguous language is not subject to interpretation by the Court but should be given full force and effect.” Syl.pt. 4, Burgess v. Moore, 224 W.Va. 291 685 S.E.2d 685 (2009). While the plain language of Exceptions 11 and 12 is clear, the language surrounding sections further support the Exceptions. Again, the trial court erred when it initially failed to give full force and effect to Exceptions 11 and 12: in the context of on-going litigation the OMA does not apply to a public receiving prompt notice and legal advice about a settlement offer. Thus, the trial court properly set aside the initial interlocutory partial summary judgment.

### **C. Trial Court Failed to Consider the OMA Settlement Exception and that Error Justified Setting Aside Partial Summary Judgment**

The trial court initially erred when it ignored --and otherwise misapplied-- the Open Meetings Act Exception for consideration of settlements found in WV Code §6-9A-4(b)(11). Said section provides an exception to the OMA and applies when a “public agency has **approved or considered a settlement in closed session**, and the terms of the settlement allow disclosure, that the terms of the settlement shall be reported by the public agency and entered into its minutes within a reasonable time after the settlement is concluded.” WV Code §6-9A-4(b)(11)(Hereinafter “Exception 11”).

Clear and unequivocal language of Exception 11 allows the Planning Commission to have “considered a settlement in closed session.” In the context of on-going litigation, Exception 11 clearly allowed a closed session and only required the Planning Commission to report the settlement in the minutes “a reasonable time after the settlement is concluded.”

As discussed earlier, the trial court operated under the misapprehension that the settlement was “concluded at the July 26<sup>th</sup>, 2011 meeting.[Appendix 789] when it initially granted partial summary judgment. This led the circuit court to erroneously conclude that the settlement had to be placed in the minutes of the July 26<sup>th</sup>, 2011, since it mistakenly believed settlement had been concluded at that time. [Appendix page 790 item 12] However, as Capriotti now concedes, the settlement was not concluded until days after July 26<sup>th</sup>, 2011, meeting. Therefore, the agreement need not have been included in the minutes of the July 26<sup>th</sup>, 2011, meeting, because the Exception 11 language of “a reasonable time after the settlement is concluded” can never require reporting before a settlement is concluded. No reasonable interpretation could ever cause “after” to mean “before.”<sup>8</sup>

**D. Trial Court Failed to Consider that Constitutional Separation of Powers Concerns Supersede the OMA and that Omission Justified Setting Aside Partial Summary Judgment**

Assuming for the sake of argument that the OMA did not provide Exceptions 11 and 12, the trial court initially erred in allowing the OMA to override the Rules of Professional Conduct because the Legislature is without Constitutional authority to limit or control the practice of law. See, e.g., State ex rel Quelch v. Daugherty 172 W.Va. 422 (1983)(Supreme Court has sole authority to regulate and discipline the practice of law) The West Virginia Constitution provides that this Court has “the power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force of law.” *W.Va. Const.* art. 8, § 3. See also, Shenandoah

---

<sup>8</sup> As argued previously, in the complaint Capriotti never raised any issue about settlement on any date other than July 26<sup>th</sup>, 2011 and never amended the complaint. See footnote 6.

Sales & Service, Inc. v. Assessor of Jefferson County, 228 W.Va. 762, 724 S.E.2d 733

(2012)(Statute which allowed non-attorney to prosecute tax appeal in circuit court was an unconstitutional act by the Legislature which interfered with the Supreme Court’s plenary constitutional authority to regulate the practice of law.)

As outlined in the prior discussion of Exception 12, the West Virginia Rules of Professional Conduct require an attorney to promptly inform a client of a settlement offer and to maintain client confidentiality. WVRPC 1.4 requires an attorney to promptly inform a client about a settlement offer. See, Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27 (1995)(Attorney violated Rules 1.1, 1.2, 1.3, and 1.4 when attorney failed to inform client of settlement offer.); Lawyer Disciplinary Board v Turgeon, 210 W.Va. 181, 557 S.E.2d 235(2000)(Attorney violated WVRPC “where attorney failed to convey plea offer.”). This Court has held that Rule 1.6 of the West Virginia Rules of Professional Conduct require an attorney to guard “all information relating to the representation of a client” and publically admonished the Attorney General for failing to follow this Rule. Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995)

With the initial order barring a lawyer from providing prompt and confidential information and advice to her client about a settlement offer, the trial court erred. Requiring an attorney simultaneously to conceal information from her client (the settlement offer) and then to breach client confidences (by requiring the attorney to place the offer and advice in public agenda prior to consultation with their client) clearly conflicts with the WVRPC. Assuming for the purposes of argument that OMA Exceptions 11 and 12 did not exist, the Legislature would still lack the Constitutional authority to place the requirements of the OMA above the duly enacted Rules of Professional Conduct.

In the context of on-going litigation, Constitutional separation of powers concerns required that the WVRPC adopted by this Court override the OMA enacted by the Legislature. Regardless of an act of the legislature an attorney must follow the WVRPC and an attorney for a public body must promptly inform her client about a settlement offer and provide confidential legal advice about the same. Therefore, under the instant facts, the trial court properly exercised its discretion when it set aside the interlocutory partial summary judgment order.

**E. Trial Court Failed to Consider that the Common law Recognition of Attorney-Client Privilege Established in Peters was Superseded by More Recently Enacted Exceptions 11 and 12 and that Error Justified Setting Aside Partial Summary Judgment**

The trial court initially erred when it imposed various improper out-of-date conditions which would serve to thwart counsel's ability to promptly and confidentially inform the Planning Commission of the settlement offer at issue. The improper out-of-date conditions sprung from the trial court's initial reading of the common law attorney-client exception to the OMA fashioned by this Court in Peters v. County Com'n of Wood County, 205 W.Va. 481, 488, 519 S.E.2d 179, 186 (1999). However, since the OMA has been amended after Peters to include Exceptions 11 and 12, the court below initially imposed the improper out-of-date Peters conditions. Under the facts at issue, the circuit court property set aside its initial partial summary judgment order.

As Peters was being decided, the Legislature amended the OMA and enacted Exceptions 11 and 12.<sup>9</sup> Prior to the Legislature's enactment of Exceptions 11 and 12, the old OMA did not recognize attorney-client privilege; "there appears to be no dispute that the Act does not contain a specifically enumerated attorney-client privilege." Peters v. County Com'n of Wood County, 205 W.Va. 481, 487 (1999) Thus, the Peter's Court grafted a common law attorney-client exception onto the old OMA and attempted to tread lightly upon the old OMA by allowing notice, agenda and minutes requirements to remain intact. Peters v. County Com'n of Wood County, 205 W.Va. 481, 519 S.E.2d 179, 187 (1999). The Legislature's enactment of Exception 11 and Exception 12 eliminated the need to follow the strictures fashioned by the Peters Court.

In addition to the amendments to the OMA, the Peters Court did not address the issue of prompt attorney-client communication during pending litigation. Rather, in Peters the parties merely conducted meetings with legal counsel concerning a routine annexation matter. Peters v. County Com'n of Wood County, 205 W.Va. 481, 483, 519 S.E.2d 179, 181 (1999). In the instant matter, the executive session at issue took place in the context of on-going litigation in which counsel had an ethical obligation to inform the client of settlement offers. Whereas counsel in Peters was not in the middle of on-going litigation and had the time to place the routine non-litigation matter on the agenda of a future meeting.<sup>10</sup>

---

<sup>9</sup> Within the Peters decision itself this Court noted "The Legislature amended significant portions of the (OMA) . . . Governor Underwood approved the amendments on April 8, 1999 and this new version will take effect 90 days from its passage." Peters at 185, 487.

<sup>10</sup> While an attorney's duties to keep a client informed and to maintain confidentiality apply at all times, this brief only addresses the duties within the context of on-going litigation where response time is most urgent and a delay in receiving information is most damaging to a client's interests.

The offer to compromise the litigation was received hours before the July 26<sup>th</sup> 2011 meeting. As any experienced litigator knows, settlement offers often arise more from deadlines than reasoned argument. To paraphrase Samuel Johnson,<sup>11</sup> nothing focuses a litigant's mind better than an impending deadline. It is no mere coincidence that the settlement offer was made the afternoon before the Planning Commission meeting. Because the all-volunteer Planning Commission typically meets only once a month, the pre-scheduled meeting was a natural deadline which resulted in the settlement offer. Thus, the conflict between the trial court's flawed application of the OMA and counsel's ethical obligation to promptly inform a client of a settlement offer will often reoccur and must be resolved in favor of the Rules of Professional Conduct. The circuit court's initial view of the OMA would have required counsel to attend the pre-planned meeting but withhold vital information from their client of the settlement offer until the next meeting. Meanwhile, the offer could grow stale or be withdrawn during the OMA forced silence.

While the goals of the OMA are laudable, this Court stated that "in drawing a line between those conversations outside the requirements of the [OMA] and those meetings that are within it, a **common sense approach** is required; one that focuses on the question of whether allowing a governing body to exclude the public from a particular meeting would undermine the Act's fundamental purposes." Syl. Pt. 4, McComas v. Board of Ed., 197 W.Va. 188, 475 S.E.2d 280 (1980). One of the essential aspects of attorney-client privilege is confidentiality. State v. Burton, 163 W.Va. 40, 254 S.E.2d 129(1979)(an essential element of attorney-client privilege "the communication between the attorney and client must be intended to be confidential.") Furthermore, this Court has held that Rule 1.6 of the West Virginia Rules of Professional

---

<sup>11</sup> "Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." — Samuel Johnson, The Life of Samuel Johnson, LL.D. Vol. III

Conduct require an attorney to guard “all information relating to the representation of a client” and publically admonished the Attorney General for failing to following this Rule. Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995). The public cannot know of legal advice without destroying the privilege and an attorney cannot reveal any client information without violating their professional obligations. It flies in the face of any common sense application of the OMA to require an attorney to withhold crucial information from a client (because notice of a then-unknown offer was not on the agenda) and simultaneously require an attorney to violate client confidentiality post a confidential settlement offer in the public meeting agenda. [Appendix 792-796]

Given the last minute nature of the last minute settlement offer and the ethical obligations imposed upon counsel during litigation, common sense dictates that the OMA must yield to a lawyer’s professional obligations under the West Virginia Rules of Professional Conduct during pending litigation.

With respect to interlocutory orders such as the one as issue herein, the Hubbard Court adopted a highly deferential abuse of discretion standard when it held “the circuit court may rule on the merits of the motions for reconsideration in the light of the broad authority it possesses under its inherent power to revisit interlocutory orders rather than the limited authority granted under Rule 60(b). 213 W.Va. at 186, 584 S.E.2d at 552. This Court further described the circuit courts authority in such situations as “**virtually unbridled discretion.**” 213 W.Va. at 186, 584 S.E.2d at 552. Specifically, the trial court possesses “the inherent procedural power to reconsider, rescind or modify an interlocutory order for cause seen by it to be sufficient.” 213 W.Va. at 185, 584 S.E.2d at 551. Thus, the trial court properly set aside summary judgment based upon further consideration of Peters in the context of newly enacted Exceptions 11 and 12.

The trial court in no way abused its ‘virtually unbridled’ discretion when it found sufficient cause to reverse partial summary judgment.

### **III. The Trial Court Never Reached The Remedy Phase And Never Concluded The “Violation” Was *De Minimis*. Thereof, The Trial Court Committed No Error Of Any Kind With Respect To This Issue.**

Capriotti claims the trial court committed error “in concluding that the Planning Commission conduct was *de minimis* and did not merit a remedy.” [Brief Assignment of Error 3] Capriotti goes to great lengths to demonstrate Petitioners strongly held opposition to any development of the real estate owned but strong beliefs cannot convert dicta into cognizable legal error.

The trial court did not reach the issue of remedy, did not make any findings with respect to remedy and did not “conclude” the violation was *de minimis*. The circuit court did not reach the remedy phase because it instead chose to exercise its discretion to set aside the interlocutory partial summary judgment order. The court’s only discussion of remedy was in the following sentences:

**“Initially**, the Court had been convinced that a violation of the OMA had occurred, as reflected in the June 2012 Partial Summary Judgment. As such, the Court **was poised** at the hearing of October 18<sup>th</sup>, 2013, to grant Intervenor’s Motion to Limit Remedy, since no sanction appeared to be merited in light of both the *de minimis* nature of said violation and the Respondent’s efforts to cure the violation.” [Appendix 1239]. . . **Petitioners’ request for remedies** . . . including attorney’s fees and costs incurred in this civil action, an injunction compelling the Jefferson County Planning Commission to comply with all the provisions of the Open Governmental Proceedings Act and the annulment of the Jefferson County Planning Commission’s decision to approve the Agreed

Settlement Order in civil action No. 11-C-125 **are rendered moot.**” [Appendix page 1245 (emphasis added)]

The only fair reading of the circuit court’s remedy language, especially in the context of an order which set aside partial summary judgment, is that the court was merely offering dicta: if it had not reversed itself, then it had contemplated the possible remedy.

Since the circuit court never reached the issue of remedy, the Planning Commission need not analyze and oppose the various factors Capriotti asserts in opposition to a position the trial court never reached.<sup>12</sup>

## **Conclusion**

Applying the highly deferential abuse of ‘virtually unbridled’ discretion standard to the trial court’s decision to set aside the interlocutory partial summary judgment order, the trial court had numerous and independently sufficient causes to set aside its initial interlocutory partial summary judgment order.

First, at the time a genuine issue of material fact as to the date the settlement concluded existed. Second, the trial court correctly found that the circumstances surrounding the July 26<sup>th</sup>, 2011 meeting triggered Exception 12. Third, the clear language of Exceptions 11 and 12 applied to a situation where counsel received an offer to settle on-going litigation immediately prior to a

---

<sup>12</sup> If the court had actually reached the issue of remedy, the Planning Commission would agree with the trial court’s dicta. The Planning Commission would have asserted that the alleged violation was not malicious but brought about by counsel’s professional obligations under the WVRPC and good faith efforts to comply and remedy the alleged violation would have served to mitigate, if not eliminate, any punitive remedies requested by Capriotti. Furthermore, the Planning Commission agrees with FAF that the parties reached the Agreed Settlement through good faith bargaining and that the parties to the Agreement were entitled to rely upon and benefit from the agreed settlement.

scheduled public meeting. Fourth, the language of the surrounding sections of the OMA supports the application of the sections as “exceptions” to notice, agenda and minutes requirements of the OMA. Fifth, Constitutional separation of powers considerations require that requirements place upon an attorney by the West Virginia Rules of Professional Conduct supersede any conflicting requirements of the OMA.

The trial court correctly exercised its inherent authority and set aside the initial grant of partial summary judgment and set forth abundant cause in the order setting aside the partial summary judgment. The trial court best summarized its cause stating:

“Exceptions 11 and 12 were ostensibly contemplated *yet not relied upon* by the Supreme Court when it decided Peters. Given the disconnect between the versions of the OMA controlling Peters and the more permissive version that controls today, this Court’s reliance upon the holding of Peters -- in particular the three statutory requirements- - is misplaced. . . The Court’s re-interpretation now is based upon a more careful reading of both the statute and Peters and as such has a cascading effect on the other points of law in the Partial Summary Judgment. . . .the Court need not repeat here the details proffered by the Respondent in its motion as to why the closed executive session of July 26<sup>th</sup>, 2011 was required under West Virginia Law. The meeting on that day was of such a nature as to warrant Exception 12 so that the public was not improperly excluded.” [Appendix page 1240, 1243-44]

Since the circuit court has ‘virtually unbridled discretion’ and since the trial court set for good and substantial reasons (both factual and legal), the trial court did not abuse its discretion when it found more than sufficient cause to set aside partial summary judgment.<sup>13</sup>

---

<sup>13</sup> While not listed as an error in the notice of appeal or in the Assignments of Error, Capriotti attempts to raise a new factual issue never raised in the complaint: the timeliness of reporting of a settlement on a date NOT alleged in the complaint. The Complaint was never amended.

The Planning Commission cannot reasonably be expected to respond to issues not raised in the complaint. “The plaintiff’s attorney must know every essential element of his cause of action and must state it in the complaint.” Sticklen v. Kittle, 168 W.Va. 147, 287 S.E.2d 148

WHEREFORE, for the reasons set forth herein, the Respondent, the Jefferson County Planning Commission, respectfully requests that this Court affirm the trial court and hold that in the context of on-going litigation the Open Meeting Act allows and the Rules of Professional Conduct require counsel for a public body to promptly and confidentially inform the public body of a settlement offer and grant such further relief as this Court deems just and equitable.

Respectfully Submitted,

Jefferson County Planning Commission, by counsel,



Stephen V. Groh  
Assistant Prosecuting Attorney  
Post Office Box 729  
Charles Town, West Virginia 25414  
West Virginia State Bar No. 6831  
304-728-3243 Phone  
304-728-3293 Fax

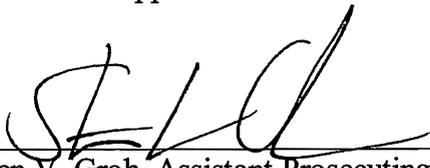
---

(1981) See also, State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc. 194 W.Va. 770, 461 S.E.2d 516 (1995) (“The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.”) Since the complaint alleged that the settlement was concluded on July 26<sup>th</sup>, 2011, and Capriotti concedes it was concluded at another time the issues raised in the complaint are moot. The 23 page Capriotti civil complaint focused entirely upon notice and agenda issues at the July 26<sup>th</sup>, 2011 meeting and events leading up to the meeting.[Appendix 275-283; See also, Planning Commission Motion to Dismiss, Appendix 301]

**Certificate of Service and Rule 7(c)(2) Certification**

On this 9<sup>th</sup> day of May, 201~~4~~, I certify that I cause a copy of the foregoing to be mailed to Intervenor's Counsel, Richard Gay, Esq. Nathan Cochran, Esq. 31 Congress St. Berkeley Springs, WV 25411 and to Linda Gutsell, Esq. Respondents' Counsel, 107 N College St. Martinsburg, WV 25401.

I further certify that I conferred in good faith with opposing counsel with respect to the contents of the appendices.

  
\_\_\_\_\_  
Stephen V. Groh, Assistant Prosecuting Attorney