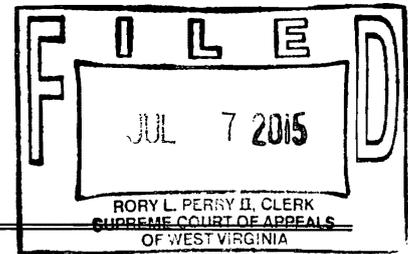


No. 14-1118



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

J. MICHAEL TEETS, COMMISSIONER;
WILLIAM E. KEPLINGER, JR., COMMISSIONER; and
HARDY COUNTY COMMISSION,
Respondents below,
Petitioners,

v.

WENDY J. MILLER, JOHN A. ELMORE,
B. WAYNE THOMPSON, OVID NEED and
BONNIE L. HAGGERTY,
Petitioners below,
Respondents,

BRIEF OF RESPONDENTS
To: Steptoe and Johnson

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Respondents

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III. SUMMARY OF ASSIGNMENTS OF ERROR

The law firm of Steptoe and Johnson, PLLC, has appeared by Bridget M. Cohee and Ancil G. Ramey for the limited purpose of addressing the issue of the attorney fees directed to be reimbursed by the law firm of Steptoe and Johnson to the Hardy County Commission within the Order of the Circuit Court of Hardy County, West Virginia, the Honorable Andrew N. Frye, Jr., entered February 19, 2015. The law firm of Steptoe and Johnson claims that the Circuit Court of Hardy County, West Virginia, erred by requiring the law firm of Steptoe and Johnson to return the sum of twenty-six thousand, five hundred twenty eight dollars and eighty cents (\$26,528.80) to the Hardy County Commission upon the claimed bases that the issue of attorney fees paid by the Hardy County Commission to the law firm of Steptoe and Johnson was not properly before the Circuit Court at the hearing on February 10, 2015; that the issue of attorney fees paid by the Hardy County Commission to Steptoe and Johnson as a part of the "conflict of interest" remanded to the Circuit Court was not included within the Order of the West Virginia Supreme Court of Appeals; and that there was no proper notice or opportunity to be heard from the Hardy County Commission, Commissioner Teets or Commissioner Keplinger, or the law firm of Steptoe and Johnson on the issue of attorney fees at the hearing of February 10, 2015. Steptoe and Johnson also claims that the attorney fees and litigation expenses paid by the Hardy County Commission were valid obligations of the Hardy County Commission based upon substantial legal services provided by Steptoe and Johnson for which Steptoe and Johnson is entitled to payment.

Respondents demand that all attorney fees paid to Steptoe and Johnson by the Hardy County Commission should be reimbursed, \$90,009.64, subject to the contract

signed by attorney Bridget M. Cohee of Steptoe and Johnson dated August 4, 2014, and by J. Michael Teets on August 25, 2014. App. 1620.

IV. STATEMENT OF CASE OF RESPONDENTS

On November 4, 2013, the Respondents in this action, Petitioners below, filed a two part Petition against Commissioners J. Michael Teets and William E. Keplinger, Jr., and the Hardy County Commission, in the Circuit Court of Hardy County, West Virginia. The first part, demanded the Removal of J. Michael Teets and William E. Keplinger, Jr., hereinafter "Teets" and "Keplinger", respectively, from the Hardy County Commission pursuant to Chapter 6, Article 6, Section 7, of the West Virginia Code. The second part, demanded that the Circuit Court of Hardy County, West Virginia, invalidate, nullify, and vacate the "Special Emergency Ambulance Service Fee Ordinance", hereinafter "the Ordinance", including the ambulance fee implemented by the Ordinance in Hardy County, West Virginia, and to vacate and nullify the purchase of the building purportedly purchased to house a county ambulance service to be created by the Hardy County Commission in Baker, West Virginia, hereinafter "Baker building". The Petition for Removal filed against Teets and Keplinger pursuant to 6-6-7 of the West Virginia Code was supported by the signatures of over one thousand (1,000) registered voters of Hardy County, West Virginia, who sought to remove Teets and Keplinger from their offices as County Commissioners of Hardy County, West Virginia, upon official misconduct, malfeasance and neglect of duty in the processes of passage of the "Special Emergency Ambulance Service Fee Ordinance" by waste of public funds, violating the public trust, ethical violations of the office and disregarding the will of the public, as well as for other causes provided by statute, for example, voting

outside of agenda; two (2) commissioners meeting outside published meetings; and “taxing” against the will of the public.

The law firm of Steptoe and Johnson, PLLC, and specifically Bridget M. Cohee, was hired by the insurance carrier of the Hardy County Commission, the West Virginia Counties Risk Pool, for purposes of defending the removal action against Commissioners Teets and Keplinger from their offices as County Commissioners. Based upon representations of Steptoe and Johnson, a reservation of rights was claimed by the West Virginia Counties Risk Pool, and coverage was denied to the Hardy County Commission on the second part of the Petition filed below, that being to invalidate, nullify and vacate the Ordinance and the purchase of the Baker building. Apparently, the Petitioners did not challenge that denial of coverage. Premised thereon, fees paid to Steptoe and Johnson for representation by the insurance carrier would have terminated as of the filing date of the Order by the three-judge panel denying removal of Teets and Keplinger from office, May 12, 2014. Thereafter, Steptoe and Johnson claims that the Hardy County Commission is solely responsible for paying their fees and expenses in the representation of the second part of the Petition below regarding nullification and invalidation of the Ordinance and the purchase of the Baker building. As of February 10, 2015, records and exhibits demonstrate Steptoe and Johnson has been paid \$90,009.64 by the Hardy County Commission for services related to the Petition below from May 13, 2014. App. 4618-4676.

The West Virginia Supreme Court of Appeals appointed Andrew N. Frye, Jr., by special assignment to consider the second portion of the original Petition, that being nullification of the Ordinance and nullification of the purchase of the Baker building. Judge Frye heard arguments and took evidence initially on July 8, 2014. Judge Frye

entered a Final Order dated August 8, 2014, therein noting the previous bifurcation of the issues of removal considered by the three-judge panel and the remaining bifurcated issues assigned for Judge Frye. Rather than recite the various findings, conclusions and Order of Judge Frye made within the Order of August 8, 2014, your Respondents note the entirety of the Order and incorporate herein by reference the entire contents of the Final Order entered by Judge Frye dated August 8, 2014. App. 463. Judge Frye made specific findings of fact and conclusions of law based upon documented evidence and the testimony taken within the trial before the three-judge panel on March 17, 18 and 19, 2014. Upon jurisdictional violations by the Hardy County Commission pursuant to Chapter 7, Article 1, Section 2 of the West Virginia Code, and upon violations of the Open Governmental Proceedings Act under Chapter 6, Article 9A, Judge Frye determined that the votes taken by the Hardy County Commission to purchase the Baker building consummated on August 2, 2013, were void, and that the vote taken by the Hardy County Commission on August 20, 2013, consummating and adopting the Ordinance was void. The Hardy County Commission was ordered to forthwith refund all money to those citizens who had previously paid the Special Emergency Ambulance Fee collected under the Ordinance.

Motions were made on behalf of the Petitioners below to enforce the Final Order of the Court of August 8, 2014, and for injunctive relief filed with the Circuit Court on August 26 and August 27, 2014, respectively. By Order entered August 29, 2014, Judge Frye granted a temporary injunction prohibiting the Hardy County Commission from taking further action on the Special Emergency Ambulance Fee Ordinance or the purchase of the Baker building until such time as a full hearing could be had on motions

filed by the parties below. A Notice of Hearing was filed by the Petitioners below scheduling a full evidentiary hearing to take place before Judge Frye on September 29, 2014, to take up all issues mandated within the Order of Judge Frye of August 29, 2014. Within the Order entered by Judge Frye dated October 10, 2014, specific findings of fact and conclusions of law were made on each of the issues scheduled and heard by Judge Frye from the Order of August 29, 2014, including a rule to show cause; the Petition for Attorney's Fees filed on behalf of the Petitioners below; the Motion of Respondents below to Amend or Correct a prior filing; the Motion of Respondents below to join the Capon Valley Bank and Jack H. Walters as parties; the Motion of Wendy J. Miller, a Petitioner below, to withdraw; the Motion of Petitioners below for Injunctive Relief Against the Hardy County Commission; the issue of repayment of County funds by Commissioners Teets and Keplinger, personally, which had been demanded in the original Petition, and which included a finding by the Circuit Court of a conflict which exists now on the part of Bridget M. Cohee and the Law Firm of Steptoe and Johnson; and the Motion for Stay requested by Respondents below. The entirety of the Order of October 10, 2014, is incorporated herein by reference as if stated fully verbatim. App. 1078.

Following entry of the Order of October 10, 2014, there were various motions and pleadings filed on behalf of the Petitioners below which raised the issue of the Conflict of Interest between Commissioners Teets and Keplinger and the Hardy County Commission, as well as the law firm of Steptoe and Johnson and Attorney Bridget M. Cohee in the representation of both, Commissioners Teets and Keplinger and the Hardy County Commission. Specifically, your Respondents would refer this honorable Court to Petitioners' Second Motion for Contempt and Motion to Enforce Order of

October 10, 2014, filed October 23, 2014, App. 1132; Petitioners' Supplement to Second Motion for Contempt filed October 30, 2014, App. 1546 ; and the Response of Petitioners to Respondents' Motion to Join Motion of the Hardy County Prosecuting Attorney to Appoint a Special Prosecutor, filed December 8, 2014, App. 1614. The pleadings and the exhibits noted to be attached to the three (3) pleadings identified within this paragraph are also incorporated herein by reference together with the specific motions noted. Respondents would note that there were no responses or replies filed on behalf of the Hardy County Commission or Teets and Keplinger by Steptoe and Johnson to any of these pleadings, at any time, in the Circuit Court of Hardy County, West Virginia, below. Steptoe and Johnson apparently ignored these pleadings as filed and the exhibits attached to them.

Steptoe and Johnson filed a Motion for Stay of the Orders of the Court below with the West Virginia Supreme Court of Appeals which precipitated a response filed by the Respondents herein, Petitioners below again raised the issues of Conflict of Interest between the Respondents below and their attorneys, Steptoe and Johnson, and disqualification. This Court entered a Scheduling Order dated November 13, 2014, therein requiring Steptoe and Johnson to file a written response within twenty-five (25) days of the date of the Order to the assertions regarding conflict of interest that were raised by the Respondents in their response to the motion for stay. Thereafter, this Court entered an Order dated January 15, 2015, remanding this matter to the Circuit Court of Hardy County, West Virginia, upon the following:

It is therefore ORDERED that this matter shall be, and it hereby is, remanded to the Circuit Court of Hardy County for the making of a record on the issue of any potential conflict of interest; for the entry of findings of fact and conclusions of law regarding the conflict issue; and for the entry of any order(s) necessary and appropriate to accommodate the foregoing. The respondents herein, petitioners

below, Wendy J. Miller, et al., are directed to participate as the movant as appropriate regarding the motion to disqualify opposing counsel.

Based upon the Order of the West Virginia Supreme Court of Appeals of January 15, 2015, the Petitioners below filed a Request for Hearing on January 23, 2015, which was served upon the Respondents below through their counsel, Bridget M. Cohee of Steptoe and Johnson, and which said request included a recitation of facts entitled

“Conflict of Interest of Counsel for Respondents ...”, outlining the issues to be brought before the Circuit Court of Hardy County, West Virginia, at the hearing which was ultimately scheduled by the Circuit Court on February 10, 2015. App 4398. Judge Frye entered a Scheduling Order on January 29, 2015, setting the matter for a “full hearing” on February 10, 2015, and directed all parties to be ready to proceed on that date. App 4406. On February 9, 2015, Petitioners below filed a Summary of Argument for the hearing of February 10, 2015, which cited specific exhibits and specific pleadings filed in the Circuit Court of Hardy County, West Virginia, which required consideration by the Circuit Court as a part of the hearing of February 10, 2015. App. 4457.

Judge Frye entered an Order regarding attorney conflict issues on February 19, 2015, upon which the Petitioners, the law firm of Steptoe and Johnson, appeal the reimbursement of attorneys fees required to be made to the Hardy County Commission by Steptoe and Johnson in the amount of twenty six thousand, five hundred twenty-eight dollars and eighty cents (\$26,528.80). App. 4709. Respondents believe that the Hardy County Commission should be reimbursed for all attorney fees paid to Steptoe and Johnson, \$90,009.64, for services rendered pursuant to the retainer agreement signed by Teets on August 25, 2014, without notice or approval of the Hardy County Commission. App. 1620.

V. SUMMARY OF ARGUMENT

The Order entered by Judge Frye dated February 19, 2015, from the proceedings which took place in the Circuit Court of Hardy County, West Virginia, on February 10, 2015, pretty much makes the argument of the Petitioners below, Respondents herein, for the substantive issues in opposition to the claimed error by the Petitioners, however, there are certain additional matters which should be considered by the Court.

The Petitioners below began raising the issues of conflict of Steptoe and Johnson in the representation of Teets and Keplinger and the Hardy County Commission as early as October 23, 2014, in the Second Motion for Contempt and Motion to Enforce the Order of the Court of October 10, 2014, which included a compact disc attached of the audio and video of a Hardy County Commission meeting which took place on October 21, 2014. App. 1132. It is necessary to review that Second Motion for Contempt and the compact disc which was filed in the Circuit Court. Attorney Cohee had claimed that the Hardy County Commission had caused a retainer agreement to be signed whereby Steptoe and Johnson would represent the Hardy County Commission. The Petitioners below filed a Supplement to the Second Motion for Contempt on October 30, 2014, together with copies of the minutes of the Hardy County Commission meetings from April 15, 2014, through October 7, 2014. App. 1546-1606. There is no mention whatsoever within any of those minutes of meetings to support the claim by Steptoe and Johnson that the Hardy County Commission considered or voted on a retainer agreement to pay Steptoe and Johnson for any representation. The Petitioners below were able to obtain a copy of the retainer

agreement of Steptoe and Johnson dated August 4, 2014, a copy of which was filed together with the Response of Petitioners to the Respondents' Motion to Join the Motion of the Hardy County Prosecuting Attorney to Appoint a Special Prosecutor, App. 1614, filed on behalf of the Petitioners below on December 8, 2014. The retainer agreement of Steptoe and Johnson dated August 4, 2014, was signed and dated by J. Michael Teets, August 25, 2014. The signing of a retainer agreement by Commissioner Teets with Steptoe and Johnson was without notice to the public and without public notice to the other County Commissioners in any formal meeting, and thereby violated 6-9A-3 of the West Virginia Code, the Open Governmental Proceedings Act of the State of West Virginia. As noted by Judge Frye within his Order of October 10, 2014, Bridget M. Cohee had various opportunities to bring the matter of a retainer agreement before the Hardy County Commission at different meetings, however, she failed to do so and she appeared to be representing primarily the interests of Commissioners Teets and Keplinger, individually, rather than the citizens of Hardy County or the interests of the Hardy County Commission as a whole, which is the representative body of the citizens of Hardy County, West Virginia.

On January 29, 2015, Judge Frye entered a Scheduling Order based upon the request of Petitioners below and the January 15, 2015, Order of the West Virginia Supreme Court of Appeals to allow a "full hearing" to be held on Tuesday, February 10, 2015. A transcript of those proceedings of February 10, 2015, was prepared, which demonstrates that all parties were allowed a full opportunity to present evidence, arguments and testimony before the Court. App. 4727-4750. The Circuit Court made no restrictions upon the parties in the presentation of their evidence concerning the matters of conflict of interest or disqualification of Steptoe and Johnson. It is unclear

how Steptoe and Johnson, the Hardy County Commission or Teets and Keplinger could claim that they were not given appropriate notice or an opportunity to be heard on any of the issues regarding the conflict of interest or disqualification raised by the Petitioners below. In any event, the evidence clearly demonstrated that Steptoe and Johnson was not hired by the Hardy County Commission until February 6, 2015. App. 4679. They were initially hired by the West Virginia Counties Risk Pool, and thereafter, a contract of employment was signed by Commissioner Teets without the authority or approval of the Hardy County Commission on August 25, 2014. There does not appear to be any contractual obligation of the citizens of Hardy County or the Hardy County Commission to pay any of the expenses or fees of Steptoe and Johnson for any representation resulting from the Petition filed on behalf of the Petitioners below on November 4, 2013. Therefore, the Court was correct in ordering reimbursement of attorney fees paid to Steptoe and Johnson by the Hardy County Commission in these proceedings.

VI. STATEMENT REGARDING ORAL ARGUMENT

Respondents believe that Rule 20 Oral Argument would be beneficial to the Court in this action based upon fundamental public importance; the construction and interpretation of statutory law by the Circuit Court; the issue of a bifurcated action below upon which there are allegations of inconsistencies and conflicts of decisions by a three-judge panel and the sitting Circuit Judge of the 22nd Circuit, appointed by special assignment, hearing separate jurisdictional issues in the same action; and procedures which appear to be matters of first impression.

VII. ARGUMENT

A. AUTHORITY OF THE CIRCUIT COURT, BURDEN OF PROOF, AND STANDARD OF REVIEW

The authority of the Circuit Court to enforce Chapter 6, Article 9A, of the West Virginia Code, is found within 6-9A-6 and 6-9A-7 giving authority to the Circuit Court of Hardy County, West Virginia, and specifically the Honorable Andrew N. Frye, Jr., for the Orders entered on August 8, 2014; August 29, 2014; October 10, 2014, and February 19, 2015.

In reviewing challenges to the findings and conclusions of the Circuit Court made after a bench trial, a two-prong differential standard of review is applied. The Final Order and the ultimate disposition are reviewed under an abuse of discretion standard, and the Circuit Court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review. Public Citizen, Inc. V. First National Bank in Fairmont, 198 W.Va 329, 480 S.E. 2d 538 (1996); Clark Apartments ex rel. Hood v. Walszczyk, 213 W.Va, 369, 582 S.E. 2d 816 (2003).

Because of the nature of the errors charged by the Petitioners in this appeal, it is necessary for the Court to consider the requirements of burden of proof before the three-judge panel under Chapter 6, Article 6, Section 7, of the West Virginia Code and before Judge Frye under Chapter 6, Article 9A. The removal of a public officer from a public position for official misconduct, malfeasance in office, incompetence, neglect of duty, or gross immorality, is considered a "drastic remedy", and statutory provisions prescribing the grounds for removal are strictly construed. In re Moore, 200 W.Va. 335, 489 S.E. 2d 492 (1997). The proof required by the Circuit Court to remove a person from public office requires "satisfactory proof of the charges" which has been held to

equate to clear and convincing evidence. Smith v. Godby, 154 W.Va. 190, 174 S.E. 2d 165 (1970). There appears to be no specific statutory designation of the burden of proof required within Chapter 6, Article 9A. Therefore, the burden of proof for the Petitioners below before Judge Frye was “by preponderance of the evidence”. This is also supported by Killen v. Logan County Commission, 170 W.Va. 602, 295 S.E. 2d 689 (1982), which held that the burden of proof for lack of notice for a Board of Equalization review before a County Commission was the preponderance standard. Killen, supra 295 S.E. 2d 689 at page 719.

The application of the doctrine of collateral estoppel is discretionary with the trial court. Conley v. Spillers, 171 W.Va. 584, 301 S.E. 2d 216 (1983). In Spillers this Court held that “trial courts are undoubtedly sensitive as we are to the need to preclude repetitive and vexatious litigation”. Spillers, supra, 301 S.E. 2d 216, 226-227. The Court further held that “ in a close case, the trial court may well decline to enforce collateral estoppel, but such declination means only that the party seeking collateral estoppel must litigate the issue which is what would have to be done if there were no earlier proceeding”. Id. In other words, the trial court has very broad discretion on issues of preclusion which cannot be disturbed on appeal unless there is a showing of an abuse of such discretion. Jordache Enterprises, Inc., v. National Union Fire Ins. Co. of Pittsburgh, Pa., 204 W.Va. 465, 513 S.E. 2d 692 (1998). The Appellate Court must be careful not to substitute its discretion for that of the trial court when the latter has not abused its discretion. Id. “It is the burden of the Appellant to show that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court”. Id.

B. CONFLICT OF INTEREST OF COUNSEL FOR PETITIONERS REPRESENTING COMMISSIONERS TEETS AND KEPLINGER, INDIVIDUALLY, AND THE HARDY COUNTY COMMISSION

Paragraph 44, page 17 of the Final Order of Judge Frye entered October 10, 2014, makes the determination that entry of the judgment against the Respondents below, Petitioners herein, Teets and Keplinger, in favor of the Hardy County Commission creates a conflict between Teets and Keplinger and the Hardy County Commission. Paragraph 9 of the Order of October 10, 2014, at page 21, specifically directs that "a conflict now exists" between the Respondents and their counsel. The Court directed the Hardy County Prosecuting Attorney, Lucas J. See, to perform his duty to protect the interests of the Hardy County Commission in this proceeding and any future proceedings regarding the matter.

The conflict of interest of Attorney Bridget M. Cohee of Steptoe and Johnson is demonstrated by the video and audio recording of a Hardy County Commission meeting which took place on October 21, 2014. The conflict is discussed within the Second Motion for Contempt and Motion to Enforce the Order of October 10, 2014, filed on behalf of the Petitioners below by Certificate dated October 23, 2014. App. 1132. A CD of the video and audio of the October 21, 2014, meeting was filed together with the Motion demonstrating that Attorney Cohee announced to the Hardy County Commission that she represents the Hardy County Commission and would be paid by the Hardy County Commission. Commissioner Wade asked the date that Steptoe and Johnson and Attorney Cohee were hired by the County Commission, with a discussion proceeding that a retainer agreement was signed by Commissioner Teets on August 25, 2014. Commissioner Wade stated on the record that he did not recall having been ask about the fee agreement being signed for Steptoe and Johnson or Bridget M.

Cohee to represent the County Commission. A review of the minutes of the Hardy County Commission from April through October, 2014, demonstrates no entry or mention of any retainer by the Hardy County Commission with Bridget M. Cohee or the law firm of Steptoe and Johnson, although Attorney Cohee was in Hardy County and met with individual Commissioners on various occasions. App. 1546-1606.

Commissioner Teets signed the retainer agreement on August 25, 2014, without the matter having been brought before the County Commission, and without any discussion before the Hardy County Commission whatsoever.

The conflict of interest of Steptoe and Johnson is raised by the Petitioners below within the Reply of Petitioners to Opposition of Respondents to Motion for Contempt, filed October 24, 2014, App. 1303; Response of Petitioners to Motion of the Hardy County Prosecuting Attorney, Lucas J. See, to Appoint a Special Prosecutor, filed October 27, 2014, App. 1307; and the Response of the Respondents herein to Emergency Motion for Stay Pending Appeal, together with the attachments, filed October 24, 2014. Commissioner Wade, the third Hardy County Commissioner, filed an ethics Complaint with the West Virginia Bar against counsel for Petitioners based upon conflicts of interest, Exhibits 22,23,24, hearing of February 10, 2015, App. 4601, 4603, and 4605. This should be considered by this Court as demonstrating the conflict of counsel for the Petitioners. A.J. Wade retired from the Hardy County Commission effective December 31, 2014.

A judgment was granted by Judge Frye in favor of the Hardy County Commission against Teets and Keplinger, individually and personally. Therefore, it cannot be denied that a conflict exists between Teets and Keplinger, personally, and the Hardy County Commission. One is a debtor and the other a creditor. Premised thereon, the

law firm of Steptoe and Johnson, Attorney Bridget M. Cohee, and all other attorneys employed by the law firm of Steptoe and Johnson, including attorney Ancil G. Ramey and attorney Amber M. Moore are conflicted by the West Virginia Rules of Professional Conduct, Rule 1.7, 1.9 and 1.10 from representing either Teets and Keplinger or the Hardy County Commission in any proceeding relating to the Petition filed against the Hardy County Commission and Commissioners Teets and Keplinger. The Hardy County Commission represents the citizens of Hardy County, West Virginia. The judgment against Teets and Keplinger, personally and in favor of the Hardy County Commission, benefits the citizens of Hardy County, West Virginia. It is therefore necessary that independent counsel represent the Hardy County Commission against Teets and Keplinger to collect the judgment rendered against them in favor of the Hardy County Commission, and thereby in favor of the citizens of Hardy County, West Virginia, as found by Judge Frye. The attorneys of the law firm of Steptoe and Johnson are conflicted from representing any party in this action. The appointment of a Special Prosecutor or other independent counsel to protect the interests of the Hardy County Commission and the citizens of Hardy County helps protect the County, but in no way cures the conflict created by the judgment of Judge Frye and as found to exist within the Orders of October 10, 2014, and February 19, 2015. App. 1078 and 4709.

C. RESPONSE TO ASSIGNMENT OF ERROR

There has been no error whatsoever demonstrated by Steptoe and Johnson, the Hardy County Commission or Commissioners Teets and Keplinger which would allow or require reversal or modification of the Order of the Circuit Court of Hardy County, West Virginia, of February 19, 2015, which requires the reimbursement and return of twenty-six thousand, five hundred twenty eight dollars and eighty cents (\$26,528.80) paid to

Step toe and Johnson by the Hardy County Commission. In actuality, the attorney fees and expenses generated by Step toe and Johnson in their efforts before the Circuit Court of Hardy County, benefitted primarily Commissioners Teets and Keplinger individually. Step toe and Johnson did little or nothing to represent or benefit the Hardy County Commission or the citizens of Hardy County, West Virginia, in the action below.

The Petitioners have raised several sub-issues of error within the singular Assignment of Error made in the Notice of Appeal by Step toe and Johnson.

Respondents have separated those sub-issues as follows:

1. Respondents dispute claims of the Petitioners that the Circuit Court erred upon a limited remand by this Court by ordering that Step toe and Johnson return the sum of twenty six thousand, five hundred twenty-eight dollars and eighty cents (\$26,528.80) to the Hardy County Commission. Step toe and Johnson goes on to claim that the fees were incurred for representation of the Hardy County Commission and the two (2) commissioners in their official capacity.

Respondents believe that Step toe and Johnson unreasonably self-limited their defense of the issues of disqualification and conflicts of interest and thereby ignored the notice provided to them for the issues which would be and were considered at the hearing of February 10, 2015. The Orders of the West Virginia Supreme Court of Appeals and the Circuit Court speak for themselves. With that said, the Supreme Court remanded the matter not only for the making of a record regarding conflict of interest, including the entry of the findings of fact and conclusions of law on the issue conflict of interest, but also for **entry of any order(s) necessary and appropriate to accommodate the foregoing.** (emphasis provided). Apparently, the attorneys of Step toe and Johnson believe that the Circuit Court did not have before it the necessary

authority to enter an Order directing reimbursement of attorney fees paid by the Hardy County Commission to Steptoe and Johnson in defending issues related to the Petition in the Circuit Court below. The West Virginia Supreme Court of Appeals will know better than I the intent of its Order, however, Steptoe and Johnson cannot under any theory claim that they did not have proper notice or an opportunity to be heard on all issues brought before the Circuit Court on February 10, 2015, and for all issues upon which Judge Frye entered the Order of February 19, 2015. The Petitioner was given every opportunity for hearing all issues of conflict on February 10, 2015.

2. The issue of fees incurred was properly before the Circuit Court on February 10, 2015. The remand was comprehensive in requiring all necessary and appropriate Orders of conflict as found by the Circuit Court.

The Order of the West Virginia Supreme Court of Appeals of January 15, 2015, directed the Respondents herein, Petitioners below, to participate as the movant, as appropriate, regarding the motion to disqualify opposing counsel (Steptoe and Johnson, Bridget M. Cohee, Ancil Ramey, et al.). Premised thereon, Steptoe and Johnson was required to respond to the assertions of conflict of interest raised by the Petitioners below before the Circuit Court of Hardy County, West Virginia, and the Honorable Andrew N. Frye, Jr. The Order of Remand by the West Virginia Supreme Court of Appeals was based upon the response made by Respondents to the Emergency Motion for Stay Pending Appeal filed by the Respondents herein by certificate which should have been dated October 24, 2014.

The Petitioners herein filed a response to the assertions regarding conflict of interest with this Court on December 8, 2014, together with various exhibits, therein largely ignoring a number of pleadings which had been filed in the Circuit Court of

Hardy County, West Virginia, which also raised allegations against the Respondents below, Petitioners herein, stating specific conflicts of interest and which demanded disqualification of Steptoe and Johnson as well as reimbursement of attorney fees paid by the Hardy County Commission to Steptoe and Johnson during the action below. Those included Petitioners' below Second Motion for Contempt and Motion to Enforce Order of October 10, 2014, filed October 23, 2014, App. 1132; Supplement to Second Motion for Contempt by Petitioners filed October 30, 2014, App. 1546; Response of Petitioners to Motion of Hardy County Prosecuting Attorney, Lucas J. See, to Appoint a Special Prosecutor filed October 27, 2014, and which included attachments of emails exchanged between counsel for the parties, David Judy and Ancil Ramey App. 1614; Reply of Petitioners in Opposition to Respondents to Motion for Contempt filed October 24, 2014 App. 130; Response of Petitioners to Respondents Motion to Join Motion of the Hardy County Prosecuting Attorney to Appoint a Special Prosecutor filed December 9, 2014, and which included as an exhibit the retainer agreement or "Engagement Letter" signed by Bridget M. Cohee and J. Michael Teets in August, 2014 App. 1614; and your Respondents would affirmatively state that the Petitioner, Steptoe and Johnson effectively ignored those motions when filed and when the issue of conflict came before the Circuit Court of Hardy County, West Virginia, the Honorable Andrew N. Frye, Jr., on February 10, 2015. It is unclear why Steptoe and Johnson ignored those pleadings since they were raised within the Request for Hearing made on behalf of the Petitioners below filed January 23, 2015, and which included a description of the issues of conflict of interest which the Petitioners below intended to bring before the Circuit Court of Hardy County, West Virginia, the Honorable Andrew N. Frye, Jr., presiding, to comply with the Order of the West Virginia Supreme Court of Appeals entered January

15, 2015. App. 4398. Petitioners below filed with the Circuit Court below, on February 9, 2015, a Summary of Argument for the hearing of February 10, 2015, together with an attachment describing all of the exhibits and pleadings which the Petitioners below anticipated would be considered by the Circuit Court on February 10, 2015. App. 4457. The Summary of Argument and attachment was emailed in its entirety to the Court and to Bridget M. Cohee and Ancil Ramey on February 9, 2015, at 2:06 pm. Your Respondents cannot comprehend how Steptoe and Johnson can claim that they were not properly noticed or how the issues of conflict were not properly before the Circuit Court on February 10, 2015.

3. Petitioner claims that neither Steptoe and Johnson nor their clients, the Hardy County Commission and the two (2) Commissioners, were provided notice or an opportunity to be heard, which your Respondents take to mean the issues of conflict of interest and disqualification of Steptoe and Johnson from further representation of the Hardy County Commission and Teets and Keplinger or any other party in this action.

As noted above, the Petitioners below filed numerous pleadings with the Circuit Court of Hardy County, West Virginia, which were ignored by Steptoe and Johnson and by the Hardy County Commission and by Teets and Keplinger. In fact, at the hearing of February 10, 2015, the transcript demonstrates at page 12, by Attorney Ramey, "we assert there is no conflict". App. 4738, line 24. At page 16, Mr. Ramey argued to the Court "it's not that the law firm of Steptoe and Johnson has a conflict, it's that the Commissioners have a conflict". App. 4742, lines 17-18. Your Respondents are uncertain why Mr. Ramey makes that argument or the context in which Attorney Ramey believes that there is some significant difference between the two. If their clients have a conflict, the attorney has a conflict.

It is unclear what kind of notice Steptoe and Johnson and their clients, the Hardy County Commission and Teets and Keplinger, thought was required to provide an opportunity to be heard. The Respondents filed numerous pleadings below alleging the various factors to consider as conflicts of interest and for disqualification, and the Petitioners below, Respondents herein, specifically requested reimbursement to the Hardy County Commission for all attorney fees expended by the County for representation by Steptoe and Johnson within the Supplement to Second Motion for Contempt filed by the Petitioners with the Circuit Court on October 30, 2014. App. 1546. The Second Motion for Contempt filed by the Petitioners below was specifically noted within the Request for Hearing which was served upon the Petitioners herein, Respondents below, by certificate dated January 23, 2015, and filed with the Circuit Clerk on that same date. App. 1132 and 4398. The various other pleadings filed with the Circuit Clerk and as hereinbefore noted were also specifically mentioned within the Request for Hearing which gave notice of the consideration of conflict of interest of Steptoe and Johnson which would be considered at the hearing before the Circuit Court as directed by the West Virginia Supreme Court of Appeals within its Order of January 15, 2015.

Also as previously discussed, the transcript of the hearing of February 10, 2015, clearly demonstrates that all parties were given every opportunity to be heard on all issues regarding conflict of interest. At page 2 of the transcript, Judge Frye ask each party if they were ready to proceed. Each party announced "yes". Arguments were made during the hearing and exhibits were filed, and when the hearing was winding down, Judge Frye specifically ask " do either of you want to present any testimony from witnesses?" Page 22, transcript of February 10, 2015. App. 4748. The Petitioners

herein, Respondents below, by attorney Cohee, stated “No, your honor.” Id. The Court then inquired: “Everybody’s finished?” to which attorney Lucas See stated “Yes, Your Honor.” Attorney Cohee said nothing. The Court then concluded the hearing. There is absolutely no basis upon which the Petitioner, Steptoe and Johnson, can claim a lack of notice or a lack of opportunity to be heard.

4. The attorney fees and litigation expenses invoiced by Steptoe and Johnson and ordered to be reimbursed were not valid obligations of the County.

As previously noted herein, and as noted within the Order of Judge Frye entered February 19, 2015, Steptoe and Johnson had no contract of employment with the Hardy County Commission. Commissioner Teets signed a retainer agreement or “Letter of Engagement” with Steptoe and Johnson on August 25, 2014. The minutes of the meetings of the Hardy County Commission demonstrate that the issue of retaining Steptoe and Johnson as counsel for the Hardy County Commission never came before the Hardy County Commission at any meeting until a special meeting was convened on February 6, 2015. Commissioner Teets signed a retainer agreement with Steptoe and Johnson on August 25, 2014, without the authority of the Hardy County Commission; without the approval of the Hardy County Commission ; and without notice to the public as required pursuant to the Open Governmental Proceedings Act, Chapter 6, Article 9A, Section 1, et seq., of the West Virginia Code. Your Respondents would also point out that Attorney Cohee of Steptoe and Johnson had every opportunity to appear before the Hardy County Commission to secure a retainer agreement. She clearly elected not to do so. From the viewpoint of your Respondents, Attorney Cohee and Steptoe and Johnson have acted in their own self-interest rather than in the interest of their clients in the acquisition of an unlawful retainer agreement, and thereafter claiming an obligation

by a public entity, the Hardy County Commission, which had nothing to do with the retainer agreement in any official forum. From a citizen's standpoint, Steptoe and Johnson and Commissioner Teets have acted in "civil conspiracy" to the detriment of the citizens of Hardy County, West Virginia. They have now come before this Court requesting the West Virginia Supreme Court of Appeals to uphold their unlawful actions which were identified by Judge Frye within his Order of February 19, 2015. Premised thereon, your Respondents do not agree that Steptoe and Johnson has incurred any "valid obligation" from the Hardy County Commission.

5. Respondents dispute claims that Steptoe and Johnson performed substantial legal services to the Hardy County Commission for which they were and are entitled to payment.

Respondents acknowledge that Steptoe and Johnson has performed substantial legal services for Commissioner Teets and Commissioner Keplinger, individually, and to support their personal interests. The Respondents have yet to see how Steptoe and Johnson has benefitted the citizens of Hardy County or the Hardy County Commission as a sovereign body representing the citizens of Hardy County. Take for instance the various notices of appeal filed by Steptoe and Johnson with this, the West Virginia Supreme Court of Appeals. The issues claimed are primarily to benefit Teets and Keplinger, individually. Respondents do acknowledge that independent counsel, John Cooper, has basically accepted the form of the Notice of Appeal as prepared by Steptoe and Johnson and as filed with this Court. Your Respondents do not understand why John Cooper is taking up those issues adverse to the interests of the citizens of Hardy County, however, for the most part, the efforts of Steptoe and Johnson have been to support Teets and Keplinger, individually. In any event, Steptoe

and Johnson had no valid contract with the Hardy County Commission by which Steptoe and Johnson is entitled to payment for the attorney fees which are directed by Judge Frye to be reimbursed. Therefore, Respondents respectfully disagree with the claims of Steptoe and Johnson as to any entitlement to payment from the Hardy County Commission. In fact, it is the position of the Respondents that Steptoe and Johnson should reimburse and refund all monies paid to them as attorney fees from the Hardy County Commission, \$90,009.64, noted in the Order of Judge Frye entered February 19, 2015.

VIII. CONCLUSION

WHEREFORE, Respondents respectfully move this Honorable Court to uphold and affirm the Order of the Circuit Court of Hardy County, West Virginia, the Honorable Andrew N. Frye, Jr., entered February 19, 2015, in it's entirety based upon the clear and correct findings of fact, conclusions of law and orders stated therein. The Petitioners were clearly given appropriate notice and every opportunity to be heard at the hearing before Judge Frye on February 10, 2015, and the Circuit Court of Hardy County, West Virginia, was completely within the spirit of the Order of this Court of January 15, 2015, in the entry of the Order of February 19, 2015, as being necessary and appropriate to accommodate issues of disqualification and conflict of interest of Steptoe and Johnson as same pertain to the Hardy County Commission.

Respondents also demand full reimbursement of all attorney fees and expenses of litigation below and through this appeal.

Wendy J. Miller, John A. Elmore,
B. Wayne Thompson,
Ovid Need and Bonnie L. Haggerty
Respondents - by Counsel

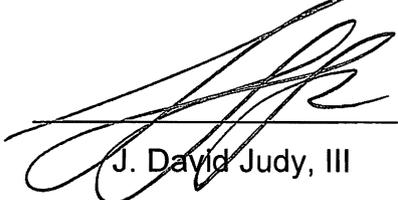
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By: 

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CERTIFICATE OF SERVICE

I, J. David Judy, III, counsel for Respondents, do hereby certify that I have served the foregoing, *Response of Brief*, upon Ancil G. Ramey, Steptoe and Johnson, PLLC, at his address of P.O. Box 2195, Huntington, West Virginia, 25722-219; John A. Kessler, of Carey, Scott, Douglas & Kessler, PLLC at his address of P.O. Box 913, Charleston, WV 25323 and upon John W. Cooper, his address of P.O. Box 365, Parsons, West Virginia, 26287, by U.S. Mail, by postage prepaid, on this 7th day of July, 2015.



J. David Judy, III