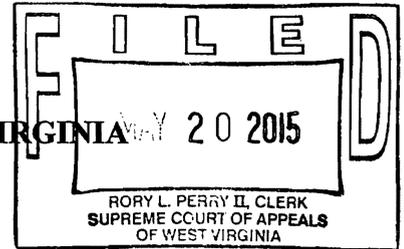


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-1333



CHRISTOPHER J. WALLACE and THE WALLACE FIRM, PLLC

Plaintiffs-Below, Petitioners

v.

RAYMOND A. HINERMAN and HINERMAN & ASSOCIATES, PLLC

Defendants-Below, Respondents

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Honorable David W. Hummel, Jr.  
Sitting by Special Assignment  
Hancock County Circuit Court  
Civil Action No. 13-C-56

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Pursuant to the West Virginia Rules of Appellate Procedure Rule 10(5)

**SUMMARY OF ARGUMENT  
OF THE RESPONDENTS**

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**RESTATEMENT OF SOME OMITTED FACTS AND MISLEADING FACTS BY PETITIONER**

This case involves Petitioner, both Petitioners will hereinafter be referred to as “Petitioner”, a lawyer, who worked as a salaried employee for Respondent, both Respondents will hereinafter be referred to as “Respondent”, for over a decade. During that period, a significant amount of Petitioner’s work was Workers’ Compensation. Petitioner used a standard office contract for Workers’ Compensation clients (Ex. 21, R. 235). Petitioner left abruptly while Respondent was on vacation and instructed other Hinerman & Associate employees that he was terminating his employment and not to tell Respondent, because he wanted to “tell Ray” personally (Tr. 370, 606). Respondent called the office daily when out of town, even on vacation, had access to email and fax machines (Tr. 599, 600, 607), but no contact with nor information about Petitioner. During Respondent’s absence, for approximately a week, Petitioner removed Workers’ Compensation files of Hinerman & Associates clients who had signed standard workers compensation contracts with Hinerman & Associates (Tr. 605). In Respondent’s absence, Petitioner removed all “his” files and personal property to his home in Pennsylvania without the knowledge or consent of his employer. (Tr. 370, 590, 607)

During Respondent’s absence Petitioner used The Wallace Firm, PLLC letterhead and listed his office address as 320 Penco Road, Weirton, West Virginia, (Tr. 373-374). Petitioner had no right to claim his office was located at 320 Penco Road, Weirton, West Virginia, which is the office of Taylor, Dittmar, & Macricostas Law Firm (Tr. 394-417, 590, 645). Petitioner in fact had no office in Weirton until after the litigation of this case began (Tr. 373-379). Petitioner solicited clients of Hinerman & Associates using a false address, in West Virginia when he in fact had no West Virginia office.

During the absence of Respondent, Petitioner held meetings in the eastern panhandle, Martinsburg and Romney with Hinerman & Associates clients and encouraged them to re-sign with The Wallace Firm, PLLC. See Tr. 651, 654, 655, 658, 660, 697.

At the time Wallace left, most of Hinerman & Associates clients had received some Workers' Compensation benefits or were then receiving benefits, or likely would receive benefits (Tr. 365).

Many of the clients of Hinerman & Associates were advised by Petitioner their action in changing attorneys from Respondent to The Wallace Firm, PLLC would be no extra charge (Tr. 14). However, Petitioner never informed Hinerman & Associates clients of the unavailability of Respondent, and the fact that in all his contacts with clients by letters, email, or fax that Hinerman & Associates knew nothing about Petitioner's surreptitious activities (Tr. 71, 371, 401, 402). Petitioner even directed office personnel not to tell Respondent what was going on (Tr. 70).

During the departure process and thereafter, Petitioner used the identical form contracts to "re-sign" clients for The Wallace Firm, PLLC, as he had used with Hinerman & Associates. The only change was a knowingly incorrect office address of The Wallace Firm, PLLC (Tr. 199) (Copy of Contract Form).

After the litigation began, Petitioner, to the knowledge of Respondent, continued to use this same "form contract", but now contends the identical Hinerman & Associates contracts are ambiguous, depriving clients of their right to change lawyers, and unfair. These are some of the facts made known to the Circuit Court of Hancock County and the issues Petitioner presents in this Court, seeking relief for his misdeeds and wrong-doing.

### **GENERAL RESPONSE TO ASSIGNMENTS OF ERROR I, II, and III**

Petitioner is estopped to argue that the contract which Petitioner used for over a decade while employed by the Respondent is now invalid since he never raised nor questioned any of the contract language which had been inserted in the contract for the sole purpose of protecting fees, yet Petitioner argues on page 14 of Petitioners' Brief as follows:

“... [The] contract impinges on a client's absolute right to select the lawyer of his or her choice by forcing the client to pay double fees, one to the discharged lawyer and one to the new lawyer.”

Hinerman & Associates used this standard contract for Workers' Compensation cases with that same language for more than a decade and Petitioner never questioned it. (See Pg. 1 of Respondent's Brief) The irony is puzzling since Petitioner continued to use the same contract form after leaving the Respondent's employment simply changed the name and address. Further, Petitioner helped in crafting the standard Hinerman & Associates Workers' Compensation contract (See Hinerman Affidavit Tr. Ex. A 789).

Petitioner further argues that at no time before the Court Order of March 1, 2014 (Tr. 185) had Respondent raised a “contract defense” in this litigation. This is incorrect because since the beginning of this matter Respondent has maintained that Petitioner was not entitled to any fee on the workers' compensation files he removed to his home in Pennsylvania. Further, with due respect to the Circuit Court, Respondent always raised issues of the applicability, *Kopelman v. Collins*, 196 W.V. 489 473 S.E.2d 910 (1996) (See Tr. 23). Contract defenses had been raised by Respondent before filing a responsive pleading, i.e. “Affirmative Defense” (Tr. 22-31) and in the “Answer” by denying Petitioner's Claim for entitlement to any fee. If these were not “contract issues”, then what were they?

Then, Petitioner on page 2-3 of his brief stated that Respondent did not assert any contract defense regarding “good cause” at that time or any other time in this litigation (Tr. 2-3). Which is also untrue.

On numerous occasions Respondent contended as follows: “Wallace deserves no fees due to mishandling of Workers’ Compensation cases (Tr. 130-141). Respondent’s “Proposed Findings of Fact and Conclusions of Law”, and “Defendants” (Below) “Closing Argument”, referred to the testimony of Sue Howard, a court recognized expert on all issues in Workers’ Compensation cases,” who questioned Petitioner’s entitlement to any part of the fees (Tr. 490, 492, 496, 497, 499).

The relevant Workers’ Compensation Contract provisions are as follows:

I do hereby authorize [insurance carrier etc.] to withhold from said awards, all attorney fees due to Hinerman & Associates.

All compensation checks are to be forwarded to my said attorney(s) and this authorization may not be canceled or withdrawn without the written consent of Hinerman & Associates.

Should the client terminate this relationship without good cause, Hinerman & Associates is entitled to collect their fee as set forth or set forth herein. Otherwise, the law set forth in *Kopelman v. Collins*, 473 SE 2d 910 (W.Va. 1996) applies.

The undersigned does hereby acknowledge that my attorneys are in a position of a secured creditor in regard to any attorney fee due them and any costs expended by them, and shall have a lien on any proceeds due me as a result of their representation on this matter. (My emphasis) (Ex. 13 Tr. 222).

These contract provisions comply with tests of *Trickett v. Laurita*, 674 SE 2d 218 (W.Va. 2009) as to what is necessary to establish an attorney’s charging lien, when signed by the client.

Syllabus No. 8:

“There are four requirements for the imposition of an attorney’s charging lien against an attorney’s client or former client. First,

there must be valid oral or written contract between the attorney and the attorney's client or former client. Second, there must be a judgment or fund that resulted from the attorney's services. Third, the attorney must have filed notice of his or her intent to assert a charging lien and such notice must have been served on the attorney's client or former client against whose interest in said judgment or fund the lien is sought to be enforce. Fourth, notice of the lien must be filed before the proceeds of the judgment or fund have been distributed."

(These conditions are all met when the client signs the contract.)

While the Circuit Court did not base its decision on a charging lien, because it never had to rule on this contract provision. *Trickett* answers all of the Assignment of Errors, and clearly demonstrates that if the Circuit Court erred, which Respondent contends, did not occur, the error is harmless. Respondent still wins error or not, because of the charging lien in favor of Hinerman & Associates. Further, any error of the Circuit Court would not be reversible due to WVRCP 61 – Harmless Error.

"No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." WVRCP 61 Harmless Error.

In regard to Petitioner's argument that the Hinerman and Associates' contract is unenforceable it appears the Doctrine of Estoppel prevents this argument from being seriously considered.

The Petitioner is assuming his two (2) clearly inconsistent views of the contract he used for years and continues to use, apparently is no bar to asserting these opposite positions about the

“issues” with the contract and especially now that he hopes the change in position will directly and financially benefit him. How can the same contract be good on one day and not good on the next?

This court in *West Virginia Department of Transportation v. Robertson*, 217 W.V. 497 618 S.E. 2d. 508 (2005) addressed the several varieties of judicial estoppel in part, as follows:

\* (Note Petitioner was not a party to the contracts)

Syllabus No. 2:

Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

While the Circuit Court did not address “estoppel” because it was unnecessary, it had been raised as an “Affirmative Defense” asserted by Respondent along with numerous other equitable defenses. (See Tr. 23, 24)

Again, this issue is being “briefed” because it directly supports Respondent’s Rule 61 “harmless error” argument. Respondent wins because of estoppel.

A witness for Respondent, Sue Howard, Esq., was accepted by the court as an expert in all W.Va. Workers’ Compensation matters (Tr. 448). Ms. Howard reviewed five (5) selected case files, and concluded the files had not been properly handled by Petitioner which caused the clients to lose significant money (and the Respondent lost money due to the 20% contingent fee) and impaired the future value of these cases. In addition, Attorney Howard reviewed the Petitioner’s deposition and other documents (Tr. 447-519) and concluded all fees should go to Hinerman & Associates (Tr. 499).

Another court recognized expert was Vincent C. Gurrera, Esq., who opined about the improper solicitation of clients by Petitioner, and felt Petitioner had inappropriate contacts with clients of Hinerman & Associates, providing “his clients” with a false address on his letterhead, etc. and thereby incorrectly suggesting he had a Weirton Office. (Pgs. 399-417)

Also, Respondent raised the issue of “standing” in the “Affirmative Defenses”. Again, the court did not rule on this issue, but it is being “briefed” to support that any action of the Circuit Court, if the court erred, would be “harmless error” (Rule 61 of the WVRCP. (id)).

Standing was discussed by this Court in *Findley v. State Farm Mutual*, 213 W.Va. 80, 576 SE 2d 807 (2002) *Certiori denied June 23, 2003*.

Syllabus No. 5:

Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury in fact” an invasion of a legally protected right which is (a) concrete and particularized, and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the Court.

Petitioner was not a party to the written contracts with the clients. In this litigation Petitioner is not seeking relief for any clients, but relief (\$) for himself. The clients have not, nor will they be injured, as Petitioner has assured them in writing that the change in law firms would add no cost to their case (Tr. 14). Again, this argument is raised in support of the Rule 61 argument of the Respondents. A resolution of this matter will be of no benefit to the clients.

#### **I. RESPONDENT’S SPECIFIC RESPONSE TO PETITIONER’S ASSIGNMENT OF ERROR # 1**

**The Court erred in holding that there was no evidence that clients discharged Hinerman & Associates for “good cause”.**

Petitioner makes no specific argument regarding this assignment of error except possibly under “B” “Outcome Below”? (Of Petitioner’s Brief) The only argument appears to be Petitioner did not have to prove “good cause” because it had been “admitted” in Respondent’s “Answer” to paragraph 26 of Petitioner’s Complaint. Paragraph 26 is as follows:

26. In this case, the clients elected, in good faith, to remain represented by Wallace, the only attorney who ever performed work on their matters. As such, each client had “good cause” to terminate their relationship with Defendants” (Tr. 10).

The Respondent in the “Answer” to paragraph 26 of the Complaint responded as follows: “17. Allegations in Paragraph 26?” (Tr. 28). This response is not explainable nor understandable except that it was “excusable neglect or a mistake”. Respondent’s position is very clear, throughout the “Answer” because there are repeated statements and denials that Petitioner was entitled to any fees.

It is noteworthy that in Petitioner’s “Response to Dismiss Defendant’s Counterclaims”, no mention is made of this “issue” of “good cause” (Tr. 37-56). Further, in “Plaintiff’s Motion for Partial Summary Judgment “(T 46)”, nor in “Plaintiff’s Reply to “Response by Defendant’s to Plaintiffs Motion to Dismiss Counterclaim” (Tr. 101-108), nor in “Plaintiff’s Reply to Defendant’s Memorandum in Support of Defendant’s Opposition to Plaintiff’s Motion for Partial Summary Judgment” nor in “Response to Plaintiff’s Motion for Partial Summary Judgment” (Tr. 113-121)”, nor in the “Affidavit of Christopher Wallace” (Ex. A Tr. 122-123), nor is it raised in “Wallace’s’ Deposition” (Tr. 163-182) (in other words Volume 1 of the transcript Pages 1- 299 there is no mention of this issue). Nor is it mentioned in Volume 11 of the transcript (pgs. 300-585). The First Time this alleged “admission” is raised with the Circuit Court is in “Plaintiff’s Motion to Reconsider or in Alternative Motion to Re-Open the Hearing” (Tr. 774) and Petitioner cites W.V. RCP 8 (d) in support of his argument. Thereafter the Court by Order of March 10, 2014 set a

scheduling Order on this Motion at (TR. 780), held a hearing. The Court noted that there was no evidence of good cause in this case.

Respondent filed "Defendant's (below) Response to Plaintiff's Motion to Reconsider or in the Alternative Motion to Re-Open (Tr. 780) responding that "The Answer was an obvious typographical omission and as a result a mistake by Defendants.

The best law on this issue is set forth in LITIGATION HANDBOOK, Second Edition, Checkly, Davis and Palmer at page 1234: Citing *McDaniel v. Romano*, 155 W.V. 875, ad 190 SE 2d 8 (1972) Note. (The Fourth Edition is now available and Romano is still authoritative).

"The policy of the law is to have every litigated case tried on its merits, and it looks with disfavor upon a party who regardless of merits of his case, attempts to take advantage of mistake, surprise or inadvertence, or neglect of his adversary"

*McDaniel v. Romano*  
155 W. Va. 875, 190 S.E.2d 8 (1972)

The burden of proof demonstrating "good cause"...must be established by particular and specific facts; conclusory statements are not sufficient to establish good cause." State ex rel *State Farm v. Bedell* 228 W.Va. 292, 719 S.E.2d 722 (W.VA. 2011) Headnote 4 of the SE Reporter. "Good cause" puts the burden on the party seeking relief to show some plainly adequate reason therefore, the courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusionary statement, in order to establish good cause" W.Va. RCP 26(c) State ex rel *Johnson v. Tsapis* 187 W.V. 337 419 S.E.2d 1 (1992). There must be a particular and specific demonstration of fact RCP 26(c) to support good cause.

The Court in this case being the fact finder found no evidence of good cause had been given. The standard of review of "findings of fact" is a clearly erroneous standard. *Carr v. Hancock*, 216 W.V. 474 607 S.E.2d 803 (2004) Further, what is "good cause" is a question of fact to be determined by the trier of fact (The Court) See *Matheny v. Farley et al* 66 S.E. 1060, 66

The court did not clearly err in finding -  
10

W.Va. 680 (W.Va. 1910). It reminds the Respondent of Justice Potter Stewart's statement in *Jacobellis v. Ohio*, 370 U.S. 184 (1964) regarding what is pornography it's hard to define but "I know it when I see it."

(Attached to the Defendant's Brief was Hinerman's Affidavit) and (Ex A) (Tr. 789) Ex. B, Ex. C, Ex. D considered by the Court prior to its ruling. Petitioner responded with "Reply to Defendant's Opposition to Plaintiff's Motion for Reconsideration or in the Alternative Motion to Re-open Hearing" (Tr. 802-814) but significantly failed to file a counter-affidavit. After a very lengthy and complete hearing (Tr. 845-885) the Court refused to grant a New trial or Re-open the case.

## II. RESPONDENT'S RESPONSE TO ASSIGNMENT OF ERROR # 2

**The Court's finding that Petitioner can enforce his contingent fee agreement against former clients violates West Virginia law and public policy by impinging on a client's absolute right to select his or her own counsel and takes inequitable advantage of the client by failing to acknowledge that a client's right to remain represented by Petitioner is "good cause".**

This Assignment of Error could be referred to as a "red herring" but that is not accurate, it has morphed into a "red whale", not just a herring.

This lawsuit was brought by Petitioner in his own name and yet he "argues" that clients are being harmed by Respondent. Why was the suit not brought on behalf of the affected clients? The answer is obvious this case is not about the clients it is all about attorney fees.

Petitioner's "concern" about clients paying double attorney fees is disingenuous. Respondent questions why Petitioner is charging fees to clients who Petitioner knows owe Hinerman and Associates fees because Petitioner had the clients sign those Hinerman & Associates Contracts and he now disparages he knew that the specific relevant contract language had been included to prevent the Attorneys hired after Hinerman & Associates were terminated, for no cause, on the client's sole motivation was to prevent Hinerman & Associates from collecting

attorney fees. Thereafter the client, if he/she needed further legal advice hired another attorney and that Attorney benefited from having Hinerman & Associates having done the “heavy lifting” and Respondent did not get paid.

Petitioner’s conundrum is never explained in its brief as to why Hinerman & Associates forms were used by Petitioner after departing Hinerman & Associates, especially since after leaving he “questioned” the contracts. Petitioner’s “contracts” which were provided to clients made false and fraudulent representations to the “new clients” that The Wallace Firm, PLLC had an office at 320 Penco Road, Weirton, WV, 26062, when in fact The Wallace Firm, PLLC had no office in Weirton nor anywhere else at that time. Respondent is not sure how long after the scheme was disclosed that the false information was corrected, if ever. Were the clients ever informed of these false representations? Petitioner was suggesting that he had a fully staffed and equipped office in Weirton. Why were Petitioner’s solicitation letters termed “urgent”? What was urgent? The only urgency was that Hinerman may find out what was going on before returning from vacation rather than after the fact?

In view of these facts, for Petitioner to argue he is acting in the best interests of the clients is laughable. This case is about nothing more than Petitioner seeking attorney fees to which Petitioner is not entitled to, for many reasons, including but not limited to the fraud in the procurement of these clients.

### **III. RESPONDENTS RESPONSE TO ASSIGNMENT OF ERROR # 3**

**PETITIONER (SIC), AS THE PARTY ATTEMPTING TO ENFORCE A NON-DEFINED, VAGUE TERM IN AN AGREEMENT HE DRAFTED HAS THE BURDEN OF PROOF TO ESTABLISH THAT THE CONTRACT TERM HAS NOT BEEN MET- NOT PETITIONER NOR THE CLIENT.**

Petitioner made a mistake, Respondent believes the first word in the assignment of error should be Respondent.

Respondent does not wish to argue this is an “admission” simply a “mistake”. Petitioner was not so “forgiving” when he tried to seize upon a “mistake” by Respondent which he contends was an “Admission”. This is not surprising in view of the manner in which Petitioner has conducted himself since leaving Hinerman & Associates.

Petitioner argues “good cause” is undefined in the Hinerman contract. Why did Petitioner raise this ambiguity when he helped draft the contract (Hinerman Affidavit) id? Why did he use this identical language in his own iteration? What epiphany occurred to him, was it money? Why did he not define “good cause”? in “his” contracts?

“Good cause” as many Courts have said is very fact dependent. Judge Hummel the trier of fact and interpreter of the law had no problem with what it meant. That’s why the absence of proof as to the facts that established “good cause” was clear to him. What law supports Petitioner’s argument of burden of proof switching? None! Petitioner has a duty to prove his theory of the case it is not “res ipsa loquiter”. Further, Petitioner seems to have his identity and that of the client’s confused. Petitioner argues it is not the client’s burden to prove good cause, but there is no client in this case. Petitioner is pro se. Petitioner continues to argue there are duplicate fees, that’s nonsense. A new lawyer can charge 20% of what he or she generate simply not try to get paid for work already done as, Petitioner attempts to do. A potential new attorney should certainly check out the client’s obligation to pay a former attorney.

The new attorney should understand he/she does not have to take the case, and before he/she does it should be because additional compensation can be generated, not because he can collect on a balance due, or to be due, from the “discharged” attorney’s work.

Petitioner does not cite any law to support his III Assignment of Error.

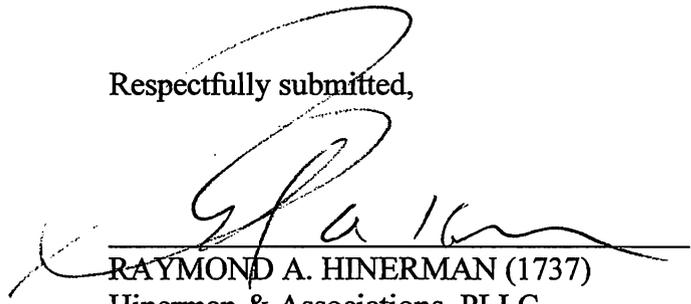
## CONCLUSION

For over a decade, Petitioner utilized a Workers' Compensation form contract he provided to clients of Hinerman & Associates. During that period he raised no issue about the validity of the contract, which he now condemns, arguing the contract is questionably unethical, ambiguous, unnecessarily limits a client's right to change lawyers, unfair, and unjust. In addition to Petitioner's failure to prove "good cause" for the client's discharge of Hinerman & Associates the Court did not have to address other defenses such as, "judicial estoppel" nor "standing". Nevertheless, this case is clearly about "good cause", "standing", and "ethics", especially based on the ethical duty of candor that lawyers owe one another, owe to the courts, the public, the law, and the clients. Petitioner, in spite of numerous pejoratives leveled against the Hinerman & Associates contract continued to utilize the same contract after leaving Hinerman & Associates only changing "Hinerman & Associates" to "The Wallace Firm, PLLC" and changing the office address to 320 Penco Road, Weirton, WV 26062, which was not his office. (My Emphasis) Petitioner is also seeking attorney fees for work performed while employed by Hinerman & Associates and argues he is being deprived of attorney fees, which he knows, he is not entitled to receive. He is seeking "unjust enrichment". Should Petitioner wish to work for his "clients" for free, then so be it, because he assured all of them by selecting him as their attorney that would not increase any fee or costs. If fees are double, as he asserts, it is because of his seeking inappropriate fees.

Respondent moves the court to affirm the complained of rulings of the Circuit Court of Hancock County, and find there was no proof of "good cause" by Petitioner and to award Respondent attorney fees due on the contracts, attorney fees and costs incurred in defending this frivolous, false and inappropriate litigation. As a further request, since the Circuit Court's Order

could be read to apply only to the five (5) “selected cases”, Respondent requests this court direct that the Circuit Court ruling apply to each and every Workers’ Compensation case signed up by Petitioner prior to filing this litigation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. A. Hinerman', is written over a horizontal line. The signature is fluid and cursive.

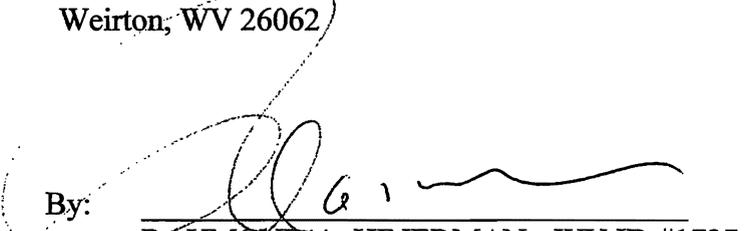
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Hinerman & Associates, PLLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of May, 2015, true and accurate copies of the SUMMARY OF ARGUMENT OF THE RESPONDENT were deposited in the United States mail, contained in postage-paid envelopes, addressed to counsel for all other parties to this appeal as follows:

Christopher J. Wallace, Esq.  
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By:   
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HINERMAN & ASSOCIATES, PLLC  
*Respondent, Pro Se*