

20-0839

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel.*, JOSEPH TKACH,

Petitioners,

v.

THE HONORABLE MICHAEL J. OLEJASZ, Judge of the
Circuit Court of Ohio County, West Virginia and DONALD PIKO,

Respondents

From the Circuit Court of
Ohio County, West Virginia
Civil Action Number: 19-C-43

PETITION FOR WRIT OF PROHIBITION

Respectfully submitted by,



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I. Question Presented

Whether a civil action instituted against a deceased individual after his passing is a viable cause of action.

II. Statement of the Case

On or about February 12, 2017, Donald Piko and Joseph Tkach were involved in a traffic collision in Ohio County, West Virginia, allegedly caused by Mr. Tkach's negligence. Mr. Tkach passed away on November 21, 2018. Appx. at pp. 22, 27, 46. On February 11, 2019 Mr. Piko filed a Complaint in the Circuit Court of Ohio County, West Virginia against the decedent. Appx. at pp. 7-21.

A Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure was filed on the basis that the lawsuit was filed against a deceased individual and, as such, constituted a legal nullity. Appx. at pp. 22-36.

Respondent filed a Response in Opposition to the Motion to Dismiss and asserted therein that W.Va. Code §55-7-8a(a) provides that injuries to the person and not resulting in death survive the death of a person liable, and cited to W.Va. R.Civ.P. 25 which provides for the substitution of parties. Appx. at pp. 37-42.

After a December 20, 2019 hearing, the Circuit Court denied the Motion to Dismiss by Order dated January 2, 2020. Appx. at p. 1. Subsequently, Petitioner requested that the Circuit Court enter an order with specific findings of fact and conclusions of law warranting the dismissal pursuant to this Court's holdings in State ex rel. Vanderra Resources, LLC v. Hummel, 242 W. Va. 35, 829 S.E.2d 35 (2019) and, on April 28, 2020, the Circuit Court issued an Amended Order denying the Motion to Dismiss. Appx. at pp. 2-4. Finally, the Circuit Court issued an Order denying Defendant's Motion to Reconsider Amended Order. Appx. at p. 6.

III. Summary of Argument

In the present case, it is undisputed that Joseph Tkach was deceased at the time that the instant lawsuit was initiated. Therefore, the lawsuit was invalid from the outset as it was initiated against a deceased individual who had neither the capacity to sue or to be sued.

Respondents misconstrue the issue in this case. It is not “whether a cause of action remains viable upon the death of the Defendant”, and Petitioner did not argue that “Defendant’s death legally prevented Plaintiff from bringing a viable lawsuit” as framed by the Circuit Court in its April 28, 2020 Order. See Appx. at p. 3. Rather, the issue presented is whether a cause of action may be instituted against a deceased individual after his passing. Petitioner submits that it may not, as a deceased individual is not a legal entity and, therefore, cannot sue or be sued. Defendants death did not prevent Plaintiff from bringing a viable lawsuit to recover for his injuries. His lawsuit survived the death of Mr. Tkach; however, he was required to institute the lawsuit against a viable legal entity.

None of the statutory language or caselaw cited by Respondents abrogate this requirement. Instead, they concern the abolition of the common law rule that abated otherwise viable claims where an injured party or wrongdoer died prior to or during the pendency of the litigation.

III. Statement Regarding Oral Argument and Decision

Pursuant to Rules 18, and 19 of the Revised Rules of Appellate Procedure, Defendant asserts that oral argument is both necessary and appropriate. See W. Va. R. App. P. 18, 19. The case is suitable for Rule 19 argument because it involves a narrow issue of law. The case is not appropriate for a memorandum decision as Petitioner contends that the decision of the Circuit Court should be reversed and, in such cases, a memorandum decision should only be entered in limited circumstances. See W. Va. R. App. P. 21.

IV. Argument

A. Standard for Issuance of a Writ of Prohibition

Pursuant to Article VIII, § 3 of the West Virginia Constitution, and West Virginia Code § 53-1-1, this Court possess original jurisdiction on all cases seeking a writ of prohibition. W. Va. Const. Art. VIII, § 3; W. Va. Code § 53-1-1 (2019) (“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.”).

The Supreme Court of Appeals of West Virginia will use prohibition to

Correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

State ex rel. Charleston Mail Ass’n v. Ranson, 200 W. Va. 5, 9, 488 S.E.2d 5 (1997).

As this Court specified in Syllabus point 10 of Jennings v. McDougale, 83 W.Va. 186, 98 S.E. 162 (1919), “[w]hen a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies.” See State ex rel. Ford Motor Co. v. McGraw, 237 W. Va. 573, 580, 788 S.E.2d 319, 326 (2016); Health Memt., Inc. v. Lindell, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999); Lewis v. Fisher, 114 W.Va. 151, 154, 171 S.E. 106, 107 (1933); see also State ex rel. City of Huntington v. Lombardo, 149 W. Va. 671, 679, 143 S.E.2d 535, 541 (1965) (“Where, however, the court or tribunal to be prohibited lacks jurisdiction to take any valid action or to enter any valid judgment, the writ of prohibition will issue against further proceedings by it, regardless of the existence and availability of other remedies.”); Norfolk S. Ry. Co. v. Maynard, 190 W.Va. 113, 120, 437 S.E.2d 277, 284 (1993) (observing that writ of prohibition is traditional method used in challenge to denial of motion to dismiss for lack of personal jurisdiction.)

Additionally, in determining whether a writ is a proper remedy where the court has exceeded its legitimate powers, this Court has established five relevant factors: (1) whether the party seeking the writ has not other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petition will be damaged or prejudiced in a way that is not correctable on appeals; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. See State ex rel. Hoover v. Berger, 199 W. Va. 12, 482 S.E.2d 12 (1996).

Notably, these factors are general guidelines that serve as a starting point for determining whether a discretionary writ of prohibition should issue, and all five factors need not be satisfied for the writ to issue; however, the existence of clear error as a matter of law, should be given substantial weight. Id.

In the present case, the Circuit Court does not have jurisdiction over the decedent, Joseph Tkach, and it committed clear error of law in denying Petitioner's Motion to Dismiss as the Circuit Court lacks jurisdiction to take any valid action or to enter any valid judgment against the decedent and, therefore, the writ of prohibition should issue against further proceedings by the Circuit Court. Further, the Circuit Court committed clear error as a matter of law in denying Petitioner's Motion to Dismiss.

B. Petitioner has no other adequate means, such as a direct appeal, to obtain relief and Petitioner will be damaged and prejudiced in a way that is not correctable on appeal if the case is allowed to proceed

Petitioner cannot directly appeal the Circuit Court's denial of its Motion to Dismiss. As such, Petitioner's only means of seeking immediate review of the Circuit Court's decision is via a prayer for a writ of prohibition. Because the lawsuit that was instituted against Mr. Tkach is a

legal nullity, Petitioner will be damaged in a way that is not correctable on appeal if the case is allowed to proceed.

Petitioner will be harmed by having to incur the time, expenses, and attorney's fees to defend itself in discovery and trial, with the end result being the high likelihood of reversal on appeal. This Court has recognized that in such situations the remedy of appeal is inadequate, and prohibition is therefore allowed. See State ex rel. Wiseman v. Henning, 212 W. Va. 128, 132, 569 S.E.2d 204, 208 (2002) ("The petitioners contend that the trial court's ruling is clearly erroneous as a matter of law. As a result of the trial court's ruling, both parties would be compelled to go through an expensive, complex trial and appeal from a final judgment, and we determine there is a high likelihood of reversal on appeal. The unreasonableness of the delay and expense is apparent. The remedy of appeal is usually deemed inadequate in these situations, and prohibition is therefore allowed.")

C. The Circuit Court's Order is clearly erroneous as a matter of law as a lawsuit cannot be initiated against a deceased individual that has neither the capacity to sue or to be sued

In a general sense, capacity to sue refers to the legal ability of a person to come into court. The quintessential example of someone who lacks capacity to sue or be sued is a deceased person, as capacity only exists in living persons. In re Estate of Sauers, 613 Pa. 186, 198, 32 A.3d 1241, 1248 (2011) citing 67A C.J.S. Parties § 11.

It is fundamental that an action at law requires a person or entity which has the right to bring the action, and a person or entity against which the action can be maintained. By its very terms, an action at law implies the existence of legal parties; they may be natural or artificial persons, but they must be entities which the law recognizes as competent. A dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect. See Thompson v. Peck, 181 A. 597 (Pa. 1935) (internal citations omitted); see also Shelton v.

Crookshank, No. 3:17-CV-108, 2017 WL 9565841, at *3 (N.D.W. Va. Nov. 17, 2017), report and recommendation adopted, No. 3:17-CV-108, 2018 WL 527423 (N.D.W. Va. Jan. 24, 2018), *aff'd* as modified, 742 F. App'x 782 (4th Cir. 2018) (a party must have a legal existence as a prerequisite to having the capacity to sue or be sued.)

1. **West Virginia statutes and caselaw have altered the common law rule that the death of an injured party or wrongdoer resulted in an abatement of an otherwise viable action but have not altered the fundamental requirement that the action must be instituted by or against a party with the capacity to sue or to be sued**

W.Va. Code §55-7-8a and subsequent cases make clear that the death of an injured party or wrongdoer no longer results in the abolition of a cause of action; however, no West Virginia statute or case abrogates the requirement that the cause of action must be filed by or against an entity with the capacity to sue or to be sued.

- a. **W.Va. Code §55-7-8a has no application to a lawsuit that is initiated against a deceased individual**

At common law a suit, whether founded on contract or tort, abated by the death of a sole plaintiff or of a sole defendant before trial or verdict, and could proceed no further. Woodford v. McDaniels, 73 W. Va. 736, 81 S.E. 544, 545 (1914). W.Va. Code §55-7-8a was enacted in 1959 and abrogated the common law rule. W.Va. Code §55-7-8a provides as follows:

- (a) In addition to the causes of action which survive at common law, causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the person liable.
- (b) If any such action is begun during the lifetime of the injured party, and within the period of time permissible under the applicable statute of limitations as provided by articles two and two-a of this chapter, **(either against the wrongdoer or his personal representative)**, and such injured party dies pending the action it may be revived in favor of the personal representative of such injured party and prosecuted to judgment

and execution against the wrongdoer or his personal representative.

- (c) If the injured party dies before having begun any such action and it is not at the time of his death barred by the applicable statute of limitations under the provisions of articles two and two-a of this chapter, such action may be begun by the personal representative of the injured party **against the wrongdoer or his personal representative and prosecuted to judgment and execution against the wrongdoer or his personal representative.** Any such action shall be instituted within the same period of time that would have been applicable had the injured party not died.
- (d) **If any such action mentioned in the preceding subsections (a), (b) and/or (c) shall have been begun against the wrongdoer and he or she dies during the pendency thereof, it may be revived against the personal representative of the wrongdoer and prosecuted to judgment and execution.**
- (e) The applicable provisions of article eight, chapter fifty-six of this code shall govern the actions hereinabove mentioned, with reference to their abatement, revival, discontinuance, reinstatement and substitution of parties.
- (f) Nothing contained in this section shall be construed to extend the time within which an action for any other tort shall be brought, nor to give the right to assign a claim for a tort not otherwise assignable.

W. Va. Code § 55-7-8a (emphasis added).

W. Va. Code § 55-7-8a abolished the common law rule that precluded a lawsuit from being instituted or continuing against the personal representative of a deceased party. However, the statute does nothing to alter the fundamental requirement that the lawsuit must be instituted against a viable legal entity.

Subpart (a) provides that causes of action for personal injuries survive and may be brought notwithstanding the death of the person entitled to recover or of the person liable. Therefore, Mr. Piko's cause of action for personal injuries arising out of the February 12, 2017 accident survived after Mr. Tkach's passing on November 21, 2018. However, his cause of action must still be

instituted against a viable legal entity. In the case of a deceased wrongdoer, the statute provides for the “revival” of a cause of action only where the wrongdoer dies during the pendency of the action. See W.Va. Code §55-7-8a(d). Nothing in W.Va. Code §55-7-8a permits a cause of action to be instituted against an entity with no capacity to be sued.

A prerequisite to any analysis regarding the application of W.Va. Code §55-7-8a is that the lawsuit was filed by or against a viable legal entity with the capacity to sue or to be sued. To wit, W. Va. Code § 55-7-8a repeatedly distinguishes between cases brought against the “wrongdoer” and those brought against his “personal representative” and further provides that the case may be “prosecuted to judgment and execution against the wrongdoer or his personal representative.” Therefore, it is clear that “wrongdoer” in the context of W.Va. Code §55-7-8a means an individual who is alive, capable of being sued, and of satisfying a judgment. Otherwise, there would be no need to make a distinction between a wrongdoer and his personal representative. See State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 146, 107 S.E.2d 353, 359 (1959) (“In applying a clear and unambiguous statute its words should be given their ordinary acceptance and significance and the meaning commonly attributed to them.”)

Additionally, to construe wrongdoer as a “deceased tortfeasor” would lead to an absurd result insofar as the statute would purportedly permit a plaintiff to “prosecute[] to judgment and execution against the [deceased tortfeasor]”. As noted above, a decedent is not a legal entity and no judgment can be entered against, or executed upon, a deceased individual. To read the statute to as permitting an action against a decedent would lead to an absurd result, which could not have been intended by the legislature. See Syl. Pt. 2, Newhart v. Pennybacker, 120 W.Va. 774, 200 S.E. 350 (1938) (“where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.”)

Given the foregoing, W.Va. Code §55-7-8a has no application to the case at bar insofar as the action was not begun against a wrongdoer who died during the pendency of the action but, rather, a decedent that is not a legal entity and does not have the capacity to sue or to be sued.

b. The holdings of Horner and Courtney have no application to a lawsuit that is initiated against a deceased individual

State ex rel. Horner v. Black, 156 W. Va. 290, 291–92, 192 S.E.2d 731, 732 (1972) and Courtney v. Courtney, 190 W. Va. 126, 127, 437 S.E.2d 436, 437 (1993) are distinguishable from the present case insofar as they did not involve cases that were initiated against a deceased individual. Horner and Courtney stand for the proposition that an otherwise viable cause of action is not abated due to the death of the injured party or wrongdoer. Petitioner does not contest that this is the law of West Virginia, only that it has no application to the present case. Mr. Piko's lawsuit survived the death of Mr. Tkach; however, he was required to institute the lawsuit against a viable legal entity and did not.

(1) State ex rel. Horner v. Black

In State ex rel. Horner v. Black, 156 W. Va. 290, 291–92, 192 S.E.2d 731, 732 (1972):

Gertrude Horner **instituted a civil action** in the Circuit Court of Wood County against Clarence Millsaps and other **defendants in May, 1969**, to recover damages for personal injuries, medical expenses, and other damages resulting from an accident involving an automobile in which she was a passenger and a truck driven by Clarence Millsaps. Service was had on all defendants who were non-residents, through the State Auditor, under the provisions of Section 11, Article 3, Chapter 56, Code of West Virginia, 1931, as amended. Subsequently, Gertrude Horner was permitted to file her first amended complaint bringing in additional defendants, they being interested either as owners of the truck or as employer of Millsaps. It appears that the employer of Millsaps and the ownership of the vehicle he was driving are in dispute between the other defendants. All defendants, including Millsaps, answered said First Amended Complaint in October, 1969.

Clarence Millsaps died August 27, 1970, a resident of North Carolina. On September 16, 1971, L. W. Bechtold, the sheriff of

Wood County, was appointed the administrator of the estate of Clarence Millsaps by the County Court of Wood County. Horner filed a written motion to be permitted to amend her complaint by substituting the administrator for Millsaps, which motion was denied by the court. Horner then moved under R.C.P. 60 for the court to 'correct' its prior order which motion was denied. Horner subsequently moved for leave to file a Third Amended Complaint which motion was also denied.

Id. (emphasis added).

Horner is distinguishable from the present case insofar as the defendant was alive at the time that the lawsuit was initiated but died during the pendency of the action. The issue in Horner was whether an action can "be revived against the fiduciary of one of several joint tort-feasors under the provisions of Chapter 55, Article 7, Section 8a". Id. At 292. In holding that such an action can be revived, the Court noted that the Circuit Court failed to recognize the application of W.Va. Code §55-7-8a(d), which specifically provides where and actions is "begun against the wrongdoer and he or she dies during the pendency thereof, it may be revived against the personal representative..."

The Court's holding in Horner, and W.Va. Code §55-7-8a(d), does not have any application to the case at bar insofar as (1) the case was not instituted against a wrongdoer with the capacity to be sued but, rather, a decedent; and (2) Mr. Tkach did not die during the pendency of the action but, rather, prior to the initiation of the lawsuit.

(2) Courtney v. Courtney

The Circuit Court's reliance on Courtney v. Courtney, 190 W. Va. 126, 127, 437 S.E.2d 436, 437 (1993) is also misplaced insofar as Courtney involved a question regarding whether claims for assault and battery and/or emotional distress are governed by a one or two year statute of limitations. It does not appear from the Court's opinion that an injured party or wrongdoer died prior to or during the pendency of the action; therefore, any reference to W.Va. Code §55-7-8a is

dicta. That said, Petitioner does not dispute that the appropriate statute of limitations for personal injuries is two years, or that such actions survive the death of the plaintiff and the tortfeasor. Such actions clearly survive; however, they must be brought by and/or against the “injured party”, “wrongdoer”, or his or her “personal representative”, i.e. by one with the capacity to sue or to be sued.

In the present case, Mr. Piko could have instituted that action on February 11, 2019 against a duly appointed representative of the Estate of Joseph Tkach. Similarly, if Mr. Piko, as opposed to Mr. Tkach, would have passed away on November 21, 2018, a duly appointed representative of Mr. Piko’s estate could have initiated a suit against Mr. Tkach. However, counsel could not have instituted an action in Mr. Piko’s name, i.e. “Donald Piko, and individual v. Joseph Tkach, and individual” as Donald Piko, deceased, does not have the capacity to sue and counsel does not have the authority to act on his behalf to institute a cause of action in his name. Rather, it is the decedent’s personal representative that has the capacity and authority to act and bring such claim in his or her representative capacity. See generally W. Va. Code, Ch. 44, Art. 1. The same is true as it pertains to a defendant. The decedent is not a legal entity, and has no capacity to be sued or to act. Any action by or upon the decedent must be made by or upon his personal representative.

(3) **Gillespie does not conflict with W.Va. Code §55-7-8a or Horner because neither has any application to a cause of action that is instituted by or against a decedent**

Unlike Horner and Courtney, Gillespie v. Johnson, 157 W. Va. 904, 209 S.E.2d 143, presented a factual scenario strikingly similar to the case at bar in which a lawsuit was instituted against a wrongdoer who passed away prior to initiation of the lawsuit.

In Gillespie, James Gillespie and William Meadows were involved in an automobile accident on October 10, 1967. Meadows died on February 16, 1968, and on September 25, 1969, Gillespie filed an action in the Common Pleas Court of Kanawha County against Meadows for

personal injuries that he suffered as a result of the accident. The Sheriff of Kanawha County was appointed as the administrator of Meadows' estate, and an amended complaint was filed on April 23, 1970 substituting the Sheriff as the defendant in his representative capacity of the decedent's estate. Thereafter, a motion to dismiss was filed wherein Meadows contended that the original action was a nullity since Meadows died before the complaint was filed. The Common Pleas Court agreed and dismissed the action. Gillespie, 157 W. Va. at 906, 209 S.E.2d at 144.

Subsequently, Gillespie filed a new action in the Circuit Court of Kanawha County against the Sheriff as the duly appointed administrator of Meadows' estate. Meadows filed a motion for summary judgment based upon the statute of limitations and res judicata, which was granted. On appeal, the Court held that a dismissal based upon the statute of limitations is res judicata stating:

It is not contested that an action instituted against a dead man is a nullity. Burket v. Aldridge, 241 Md. 423, 216 A.2d 910. The amended complaint was filed against the personal representative after the running of the statute of limitations. The dismissal by the Common Pleas Court on the grounds that it was barred by the statute of limitations, which was properly pleaded, was a final judgment on the merits, was not appealed and is, therefore, res judicata. 6 J. Moore, Federal Practice s 56.03, at 2051 (2d ed. 1953).

Gillespie v. Johnson, 157 W. Va. 904, 909, 209 S.E.2d 143, 145 (1974) (emphasis added).

Petitioner submits that the Court in Gillespie was cognizant of W.Va. Code §55-7-8a, which was enacted in 1959, and of its prior decision in Horner when it issued its opinion and articulated the general principal that an action instituted against a dead man is a nullity, and that such a statement had no impact on either Horner or W.Va. Code §55-7-8a given that they do not repeal the requirement that a lawsuit be instituted against a viable legal entity with the capacity to sue or to be sued but, rather, the common law rule that abated otherwise viable actions upon the death of the injured party or wrongdoer.

IV. Conclusion

W.Va. Code §55-7-8a altered the common law rule that abated otherwise viable causes of action upon the death of the injured party or wrongdoer. Therefore, despite the death of Mr. Tkach, Mr. Piko could have instituted a cause of action against his personal representative; however, he did not. The lawsuit that he filed against the decedent is a legal nullity. Neither W.Va. Code §55-7-8a nor any West Virginia caselaw dispenses with the requirement that the cause of action must be initiated against a viable legal entity.

The Circuit Court lacks jurisdiction to take any valid action or to enter any valid judgment with regard to the decedent Joseph Tkach, and it committed clear legal error in failing to grant Petitioner's Motion to Dismiss. Petitioner therefore requests that this Court grant it relief in the form of an Order that (1) directs the Circuit Court to grant Petitioner's Motion to Dismiss and (2) directs the Circuit Court to dismiss, with prejudice, all of Mr. Piko's causes of action against the decedent Joseph Tkach.

Respectfully submitted by,



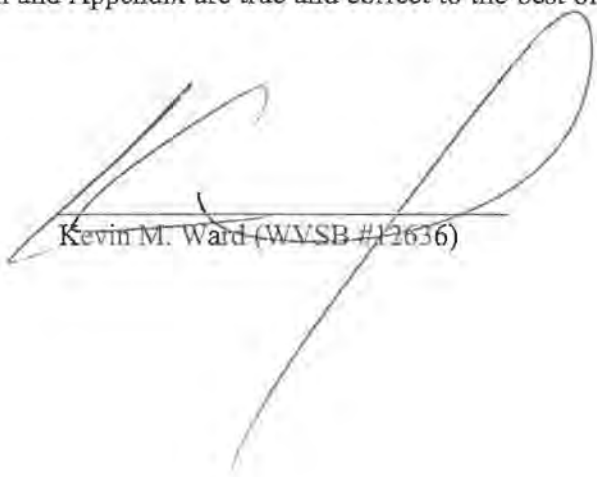
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Counsel for Defendant Joseph Tkach

VERIFICATION
Per West Virginia Code §53-1-3

I, the undersigned counsel for the Petitioner, hereby certify that the facts and allegations contained in the Petition for Writ of Prohibition and Appendix are true and correct to the best of my belief and knowledge.

Dated: 10/19/20


Kevin M. Ward (WVSB #12636)

CERTIFICATE OF SERVICE

I, the undersigned counsel for the Petitioner, hereby certify that I served a true copy of the foregoing **Petition for Writ of Prohibition** and **Appendix** upon the following individuals, on the 19 day of Oct, 2020.

Paul Harris, Esq.
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Judge Michael J. Olejasz
Ohio County Courthouse
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304-234-3620

Respectfully submitted by,


Kevin M. Ward (WVSB #12636)