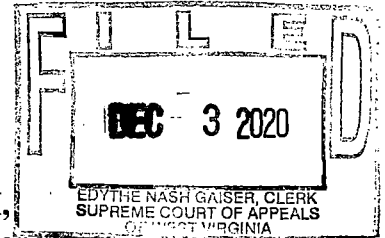


FILE COPY

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

**DO NOT REMOVE
FILE COPY**

No. 20-0839
Ohio County Circuit Court Case No.: 19-C-43



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.

RESPONDENT DONALD PIKO'S SUMMARY RESPONSE

Paul J. Harris
W.Va. Bar #4673
Harris Law Offices
32 Fifteenth Street
Wheeling, WV 26003
(304) 232-5300
Counsel for Respondent Donald Piko

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY RESPONSE 1

CONCLUSION..... 3

CERTIFICATE OF SERVICE..... 4

TABLE OF AUTHORITIES

Cases

Courtney v. Courtney, 190 W.Va. 126, 437 S.E.2d 436 (1993) 1

Rules

W.Va. R.C.P. Rule 25 1

W.Va. R. App. Procedure Rule 5(a) 2

W.Va. R. App. Procedure Rule 5(b) 2

W.Va. R. App. Procedure Rule 16(h) 1

W.Va. R. App. Procedure Rule 16(b) 3

Statutes

W.Va. Code §55-7-8(a) 1, 2

SUMMARY RESPONSE

Pursuant to Rule 16(h) of the W.Va. Rules of Appellate Procedure, Respondent Donald Piko submits this summary response to the petition for writ of prohibition filed by Petitioners. This case stems from an automobile accident that occurred in Ohio County, West Virginia on February 12, 2017. Due to the negligence of Joseph Tkach, Respondent Donald Piko was injured. A complaint was timely filed in the Circuit Court of Ohio County, West Virginia on February 11, 2019. Unbeknownst to Respondent, Mr. Tkach had passed away on November 21, 2018. When it was discovered that Mr. Tkach was deceased, and pursuant to Rule 25 of the W.Va. Rules of Civil Procedure, Respondent filed a motion with the circuit court to amend the complaint to substitute the parties.

Rule 25 of the W.Va. Rules of Civil Procedure provides, in pertinent part:

Rule 25. Substitution of parties

(a) Death. —

- (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Petitioner argues that the lower court erred by denying his motion to dismiss based on outdated West Virginia caselaw. In *Courtney v. Courtney*, 190 W.Va. 126, 437 S.E.2d 436 (1993), the Supreme Court held, “[i]n actions for damages to property and for personal injuries, the appropriate statute of limitations under W.Va. Code, 55-2-12 (1959), is two years. These actions by virtue of W.Va. Code, 55-7-8a(a) (1959), survive the death of the plaintiff and the tortfeasor.”

W.Va. Code §55-7-8a(a) provides:

Actions which survive; limitations; law governing such actions.

(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.

The clear language of the W.Va. Code §55-7-8a(a) provides that Respondent's claim survives the death of a party for causes of action for personal injuries.

Notwithstanding the foregoing arguments, Petitioner's petition is untimely. The lower court entered an Amended Order on April 28, 2020, denying Petitioner's motion to dismiss. The petition for a writ was filed on October 19, 2020, nearly six (6) months after the order was entered. Appeals from an order entered in circuit court are governed by Rule 5(a) of the W.Va. Rules of Appellate Procedure which provides:

Appeals from circuit court.

Applicability. This rule governs all appeals from a circuit court final judgment or other appealable order in a civil or criminal case...

Rule 5(b) of the W.Va. Rules of Appellate Procedure contains a thirty (30) day time limit to file a notice of appeal.

Docketing the appeal. Within thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules.

Original jurisdiction on petitions for writ of prohibitions are governed by Rule 16(b) of the West Virginia Rules of Appellate Procedure which provides:

Docketing the petition. An original jurisdiction action will be docketed upon the timely and proper filing with the Clerk of the Supreme Court
(*Emphasis supplied.*)

The petition was filed nearly six (6) months after the circuit court's entry of the order denying the motion to dismiss. It is believed the petition is untimely.

CONCLUSION

Respondent Donald Piko prays that this Honorable Court deny the petition for writ of prohibition.

Respondent,
Donald Piko
by counsel,



Paul J. Harris
W.Va. Bar #4673
Harris Law Offices
32 Fifteenth Street
Wheeling, WV 26003
(304) 232-5300

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd of December, 2020, a true and accurate copy of the foregoing *Respondent Donald Piko's Summary Response* was delivered via U.S. Mail as follows:

Kevin M. Ward, Esq.
P. Joseph Craycraft, Esq.
Swartz Campbell, LLC
1233 Main Street, Suite 1000
Wheeling, WV 26003



Paul J. Harris