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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0311

(Underlying Mingo County Civil Action No. 18-C-142)

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STATE OF WEST VIRGINIA EX REL. MINGO COUNTY BOARD OF EDUCATION,

Petitioner/Defendant,

v.

**HONORABLE MIKI THOMPSON, Judge of the Circuit Court of
Mingo County, West Virginia, and "BIG JIM" HATFIELD, Plaintiff below,**

Respondents.

**SUMMARY RESPONSE TO AMENDED VERIFIED PETITION FOR WRITS OF
PROHIBITION AND MANDAMUS**

PREPARED BY:

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Dated: May 20, 2021

TABLE OF CONTENTS

I.	QUESTIONS PRESENTED	1
II.	STATEMENT OF THE CASE	1
III.	STANDARD OF REVIEW.....	4
IV.	ARGUMENT.....	6
V.	CONCLUSION	12

I. QUESTIONS PRESENTED

Petitioner presented one Question in its *Amended Verified Petition for Writs of Prohibition and Mandamus*; however, Respondent respectfully suggests there are two Questions at issue:

1. Whether Petitioner is entitled to a Writ of Mandamus compelling the Circuit Court to enter an order regarding its Motions for Summary Judgment before the completion of reasonable, pertinent and required discovery?

ANSWER: No. The Circuit Court should allow the parties to complete Discovery before Motions for Summary Judgment are decided.

2. Whether the Circuit Court committed clear legal error and exceeded its legitimate powers by Ordering necessary and pertinent Discovery to be completed in this case before ruling on Motions for Summary Judgment filed by the Petitioner?

ANSWER: No. The Circuit Court did not exceed its legitimate powers by Ordering reasonable and pertinent Discovery to be completed before considering Motions for Summary Judgment filed by Petitioner and Ordering Petitioner to bear the cost of Depositions and Mediation because of Petitioner's incomplete and untimely filing of its witnesses.

II. STATEMENT OF CASE

The Circuit Court entered a Time Frame Order on August 12, 2020. App. 78-79. The trial was set for February 1, 2021; Plaintiff's Expert and Lay Witness Lists to be submitted 120 days before trial (Saturday, 10/3/2020); Defendant's Expert and Lay Witness Lists to be provided 10 days thereafter. Any outstanding motions, including Motions in Limine were scheduled to be heard at Pretrial Conference set for January 12, 2021.

Due to a scheduling conflict, the Court Circuit reset the Pretrial Conference to January 14, 2021 at 2:00 p.m. On January 14th, the following motions were pending before the Court: 1) *Defendant's Motion for Summary Judgment on Liability*, App. 120-140; 2) *Defendant's Motion for Summary Judgment on*

Damages, App. 141-151; 3) *Plaintiff's Motion for Partial Summary Judgment*, App. 206-215; 4) *Plaintiff's Motion to Strike Defendant's Expert Witness*, App. 216-218; 5) *Defendant's Motion in Limine to Exclude Plaintiff's Expert*, App. 202-205; 6) *Defendant's Motions in Limine Nos. 1-23*, App. 162-184; 7) *Plaintiff's Motion in Limine to Exclude Mingo County Board of Education Agent/Employees*, App. 251-253; and 8) *Plaintiff's Motion to Strike Defendant's Fact Witnesses*, App. 259-262. The parties first presented their arguments in support of the motions for summary judgment. In his Response to *Defendant's Motion for Summary Judgment on Liability*, Respondent argued, among other things, that the Affidavit of Principal, Deborah Harris, attached as Exhibit 2 to said motion, App. 120-140, should not be considered as Defendant failed to produce a Rule 30(b)(7) representative in response to Plaintiff's Rule 30(b)(7) Notice, App. 48-52. The argument regarding the Defendant's failure to produce any Rule 30(b)(7) representative(s) was more fully briefed in *Plaintiff's Motion in Limine to Exclude the Testimony of any Mingo County Board of Education Agent/Employee Regarding the Parking Area of the Football Facility at MCHS* and incorporated in *Plaintiff's Response to Defendant's Motion for Summary Judgment on Liability*, pg. 2. , App. 276-283.

Due to time constraints, only the Motions for Summary Judgment were argued. At no time did the Court indicate that it would deny the dispositive motions.¹ In fact, the Court requested proposed orders regarding the pending motions for summary judgment from the parties. *See* App. 286-337. At a subsequent hearing on February 25, 2021, the Court set the trial for July 22, 2021 and scheduled a hearing on March 23, 2021 for arguments on the remaining motions.

On March 23, 2021, the Court heard several motions filed by each party. Respondent's motions focused on the fact that Petitioner failed to timely and adequately supplement discovery responses related to lay and expert witness information, and the untimely filing of lay and expert witness disclosures. After hearing arguments of counsel and reviewing the pleadings, the Court Ordered the completion of necessary and pertinent discovery and Ordered Petitioner to bear the cost of same, including Mediation. The Court never

¹ Petitioner has requested the transcript from the January 14, 2021 Pretrial Conference and will move to supplement the Appendix when the transcript is received.

declined to enter an order addressing Defendants Dispositive Motions. The Court Ordered discovery to be completed and then said Motions for Summary Judgment would be considered thereafter together with motions in limine. The Petitioner's hasty filing of this Petition is ill-timed, precipitous and impetuous. Petitioner has misrepresented the posture of this case as the Circuit Court has not DECLINED to enter an Order regarding *Defendant's Motion for Summary Judgment on Liability* as claimed. Instead, the Court held motions for summary judgment and other motions in abeyance until the completion of the ordered discovery. A copy of the Transcript clearly indicates the actions of the Court did not exceed its legitimate authority by ordering the completion of necessary and pertinent discovery.

The ruling of the Court at the hearing of March 23, 2021 is clear in this regard as follows:

TR Page 16, Line 10-13; THE COURT STATES: "Yes, but see, if they have been disclosed timely, you know, then that information could have been used in mediation or in some way, you know, she could have deposed them." App. 363

TR Page 17-18, Line 6-9 and 21-24; Page 18 Line 1-4 and 14-23:
THE COURT STATES: "I'm going to let them testify, but I'm also going to let you depose them if you want to and the Defendant is going to pay for that and also- well, let's go on and let me hear the other motions. What else?" App. 364

"Let me say this. There's probably, after these depositions, if Ms. Chafin decides to do those, there's probably going to be more motions, I would suspect so let's address all of these at a later date. We have a (continues to Page 18 Line 1-4) little bit of time until July, and I'm also going to order after these depositions that- you know, there's probably going to be new information and I'm going to order mediation again at the Defendant's expense." App. 364-365

"I'm just directing you to pay for the mediation and for the depositions. They weren't disclosed timely, and I believe that there's a good possibility that that failure to disclose timely could have affected the results of mediation. It needs to be mediated again, so that's what we're

going to do and we'll set another hearing. Matt, we'll set it sometime before July- **LAW CLERK CHANDLER:** - June 22nd, at 1:30. **THE COURT:** June 22nd at 1:30 we'll address all outstanding motions." App. 365.

III. STANDARD OF REVIEW

"Issuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised." *West Virginia Rules of Appellate Procedure*, Rule 16(a). In regard to the writ of prohibition, this Court has specifically said, "[t]he extraordinary remedy of a writ of prohibition is to be used sparingly." *State ex rel. Almond v. Rudolph*, 238 W.Va. 289, 794 S.E.2d 10, 15 (2016). A writ of prohibition is an extraordinary remedy. It is only available when a Petitioner can show that "... the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1." Syl. Pt. 1, *State ex rel. Hope Clinic, PLLC v. McGraw* (W.Va. 2021), citing, Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). "This Court is 'restrictive in its use of prohibition as a remedy.'" *State ex rel. Allstate Inc. Co. v. Gaughan*, 220 W.Va. 113, 640 S.E.2d 176 (2006) citing, *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 15, 483 S.E.2d 12, 15 (1996).

Thus, the question is whether the Circuit Court exceeded its legitimate powers in permitting Respondent to depose Petitioner's fact witnesses and expert witnesses who were not properly or timely disclosed and requiring the Petitioner to bear the cost and ordering mediation at the expense of the Petitioner prior to ruling on dispositive motions. Central to that analysis is whether the Court's discovery order was "**clearly erroneous**" as a matter of law. *Hoover v. Berger*, at 14-15.

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, **this Court will use prohibition in this discretionary way 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. Nelson v. Frye, 221 W.Va. 391, 655 S.E.2d 137 (2007), citing Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). (emphasis added).

Petitioner has failed to carry its very high burden to show there are absolutely no factual issues remaining relevant to the ultimate determination and that the issues are solely legal in nature and that the lower Court committed a "substantial, clear-cut, legal error." *Nelson*, 221 W.Va. 391, at 395.

A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the Petitioner to the relief sought; (2) a legal duty on the part of Respondent to do the thing which the Petitioner seeks to compel; and (3) the absence of another remedy." Syl. Pt. 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847; Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). "When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance, such duty is ministerial, and a writ of mandamus to compel the performance of such duty will specify the exact mode of performance." *State*

ex rel. Judy v. Kiger, 153 W.Va. 764, 172 S.E.2d 579 (1970). Petitioner has failed to demonstrate it has a clear right to the relief sought. The Court used its legitimate discretionary powers to hold its decision on Petitioner's dispositive motions in abeyance until the completion discovery rulings. The appropriate remedy afforded the Petitioner is to appear at the hearing scheduled for June 22, 2021 at 1:30 p.m. when the Court will "**address all outstanding motions.**" App. 365. Petitioner has likewise failed to show it is entitled to a writ of mandamus.

IV. ARGUMENT

A. THE CIRCUIT COURT DID NOT NEGLECT ITS DUTY TO ENTER AN ORDER ADDRESSING PETITIONER'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY NOR DID THE CIRCUIT COURT'S DISCOVERY ORDERS EXCEED ITS LEGITIMATE POWERS

Contrary to Petitioner's misrepresentations, the Court did not deny the *Petitioner's Motion for Summary Judgment on Liability* nor did the Court fail to enter an order. The Court, at its discretion, decided to hold its rulings in abeyance until June 22, 2021 after the conclusion of discovery ordered by the Court. At the June 22, 2021 hearing the Court said it would address all outstanding motions prior to the July 22, 2021 trial. The Petitioner is not entitled to a writ of mandamus just because it thinks the Circuit Court is not acting as fast as it would like, particularly when the Court delayed rulings on the dispositive motion to address discovery issues caused by the Petitioner's untimely and inadequate witness disclosures. Ironically, the Petitioner would likely have its Motion for Summary Judgment on Liability decided sooner had it not filed the instant Petition.

The Circuit Court exercised its legitimate powers in ordering that Respondent be permitted to take the depositions of certain witnesses that the Petitioner failed to timely and adequately disclose, including Mingo County Board of Education agents and employees whom the Petitioner failed to designate as Rule 30(b)(7) representative(s). Petitioner's Lay and Expert witness disclosures were untimely filed, and in violation of Rule 26(e)(1)(A) and (B) of the *West Virginia Rules of Civil Procedure*. The Petitioner's Expert Witness Disclosure provided only the name and address of the

expert. App. 87-89. It did not include the expert's area of expertise, the subject matter on which the expert is expected to testify or the substance of the expert's testimony. Further, the Petitioner failed to supplement its discovery response with the expert witness information as required by Rule 26(e)(1)(B). The Petitioner failed to seasonably supplement its discovery responses even after the Respondent sent a good faith letter requesting same. Pursuant to the West Virginia Rules of Civil Procedure, if supplementation is not made as required by Rule 26, the Court, upon motion or **upon its own initiative** may impose an appropriate sanction. *West Virginia Rules of Civil Procedure*, Rule 26 (e)(3). (emphasis added).

The Petitioner's inadequate and untimely witness disclosures rendered it impossible for the Respondent, who unlike the Petitioner has limited resources, to assess which of the Petitioner's witnesses it needed to depose.

The Petitioner has failed to carry its extreme burden required to be granted an extraordinary Writ of Prohibition and/or a Writ of Mandamus against the lower Court, thus, the Petition should be denied.

I. PETITIONER'S REQUEST FOR A WRIT OF MANDAMUS IS LIKEWISE PREMATURE AND MUST ALSO FAILS

There is nothing in the Petitioner's Appendix to support the Petitioner's claim that the Court denied its *Motion for Summary Judgment on Liability*. The Petitioner has not produced a transcript of the January 14, 2021 hearing nor did the Petitioner request a transcript of said hearing. At the conclusion of the January 14th hearing, wherein the Petitioner proports the Court denied its motion, the Court requested proposed orders from both parties. Petitioner submitted a Proposed Order Granting Defendant's Motion for Summary Judgment on Damages, App. 286-302, and a Proposed Order Granting Defendant's Motion of Summary Judgment on Liability, App. 303-327. The Respondent likewise submitted a Proposed Order Granting Plaintiff's Motion for Partial Summary Judgment, App. 328-327. Why would the parties submit proposed orders granting motions for summary judgment if the Court indicated it would deny the motions? The

answer is clear – the Court never indicated how it would rule on the parties’ dispositive motions. The Petitioner cannot have a clear right to have any improper denial of immunity addressed on appeal when there has been no denial.

While the Court does have a duty to enter a detailed order addressing its rulings regarding the Petitioner’s immunity assertions, it does not have a duty to enter an order prematurely. Before ruling on the parties’ motions for summary judgment, the Court addressed motions related to discovery. “[A] decision for summary judgment before discovery has been completed must ordinarily be viewed as precipitous.” *Crain v. Lightner*, 364 S.E.2d 778 (1987), quoting, *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 267 S.E.2d 440, 443 (1980).

On September 5, 2019, Respondent served Notice of a Rule 30(b)(7) Deposition on Petitioner. App. 48-52. The notice identified ten (10) subject matters and seven (7) requests for production of documents. Despite numerous requests to produce a corporate representative, Petitioner failed to do so. Yet in its *Motion for Summary Judgment on Liability*, App. 120-140, Petitioner attached as Exhibit 2. the Affidavit of Deborah Harris, former Principal at Mingo Central High School² who proports to have information regarding the parking lot where the Respondent was injured. Additionally, Deborah Harris was untimely disclosed as a fact witness. Respondent filed a motion to strike, App. 259-262, and a motion to exclude testimony, App. 340-343, of Ms. Harris and other witnesses. These motions were pending on January 14, 2021 and the discovery issues were raised in conjunction with Respondent’s response to Petitioner’s dispositive motion. App. 276-283. Moreover, on January 14, 2021, the Respondent argued that the Petitioner’s use of Ms. Harris’ affidavit in its *Motion for Summary Judgment on Liability* should not be permitted because of its failure to identify any Rule 30(b)(7) representative(s) in response to Respondent’s notice. Rulings on Respondent’s motions to strike and exclude certain witnesses, including Ms. Harris, were necessary prior to the Court considering a dispositive motion that relied upon her affidavit.

² Petitioner did not include exhibits parties’ motions as part of the Appendix.

Petitioner also failed to supplement its discovery responses as required by Rule 26(e) of the *West Virginia Rule of Civil Procedure*. On October 19, 2020, Respondent sent a good faith letter to Petitioner requesting it supplement its discovery responses including, but not limited to, the Petitioner's failure to supplement Interrogatory No. 29 requesting the name, address, and a detailed summary of the expected testimony of any person to be called as a witness. App. 93-94. Rather than strike or exclude the testimony of the Petitioner's witnesses, the Court ordered the Petitioner to make the witnesses available for Deposition to the Respondent at the Petitioner's expense.

Petitioner's Request for a *writ of mandamus* is premature and should be denied as the Court has indicated it will hear all outstanding motions on June 22, 2021 and the parties' dispositional motions ruled on prior to trial.

ii. **THE CIRCUIT COURT'S DISCOVERY RULINGS DID NOT
EXCEED ITS LEGITIMATE POWERS AND WERE NOT AN
ABUSE OF ITS DISCRETION**

"A writ of prohibition is available to correct a **clear legal error** resulting from a trial court's **substantial abuse** of its discretion in regard to discovery orders." 188 W.Va. 622, 425 S.E.2d 577 (1992), (*emphasis added*). Anything less than a **substantial abuse** of the Court's discretion and the writ of prohibition must be denied. Conversely stated, "a writ of prohibition will not issue to prevent a **simple abuse** of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1." Syl. Pt. 1, *Hope Clinic* (*emphasis added*).

After considering the pleadings and hearing arguments from counsel the Court found the Petitioner had not supplemented its discovery, had not timely filed its witness disclosures, and had not identified and provided to the Respondent any 30(b)(7) representative(s) and ordered Petitioner to make those witness available to the Respondent for deposition and to bear the cost of those depositions. All pending motions were held in abeyance to be adjudicated at the June 22, 2021 hearing prior to the July 22, 2021 trial date. Similar discovery orders from lower courts around

the State of West Virginia are issued every day. Just because the Petitioner disagrees with the Circuit Court's orders does not render the order a "substantial abuse of discretion" nor does it justify the granting of a Writ of Prohibition.

In *State Farm Mutual Automobile Insurance Co. v. Stephens*, this Court held that the lower court substantially abused its discretion by ordering the production of claims filed against State Farm throughout the entire country at the cost of approximately \$40 million and years of man-hours to produce. Far from the substantial abuse of discretion of the lower court in *Stephens*, the Circuit Court in the case at bar fashioned a reasonable discovery remedy that did not abuse its discretion by permitting the Respondent to take the depositions of some of the Petitioner's untimely disclosed witnesses at the Petitioner's expense.

Given that the Petitioner relies on the affidavit of Deborah Harris, a corporate representative, in its *Motion for Summary Judgment on Liability* who should have been disclosed to the Respondent in response to the Notice of Rule 30(b)(7) Deposition, it is entirely within the Court's discretion to order the Respondent be permitted to depose said witness. It is also within the Court's discretion to permit the Respondent to depose the other lay witnesses disclosed by the Petitioner who may have been corporate representative(s) that should have been identified in response to the Rule 30(b)(7) Notice.

As stated above, Rule 26 of the *West Virginia Rules of Civil Procedure* gives the Court the ability, upon its own initiative, to impose an appropriate sanction upon a party who fails to seasonally supplement that party's responses. In his First Set of Interrogatories, Respondent asked Petitioner to identify the name and address of any person who you intend to call as a witness and provide a detailed summary of their expected testimony. Petitioner objected to the request and responded that it would provide a witness list in accordance with the Court's scheduling order. Respondent received the Petitioner's Lay Witness Disclosures on October 19, 2020. Upon receipt of said disclosures, Respondent sent a Good Faith Letter to Petitioner requesting it supplement its

discovery responses including, but not limited to, Interrogatories requesting detailed information of lay and expert witnesses. The Petitioner never responded to the letter or supplemented its discovery responses. Respondent moved the Court to strike and/or exclude the testimony of the Petitioner's lay and expert witnesses. The Court declined to exclude the Petitioner's witnesses and instead ordered that Respondent be permitted to take their depositions.

Additionally, the Court properly concluded that the failure of the Petitioner to timely and adequately disclose 30(b)(7) representative(s), lay witnesses and expert witnesses had a negative effect on the parties' mediation, thus the Court order the parties conduct mediation after the depositions.

Regardless of how the time-period is calculated, the Petitioner's witness disclosures were improperly and untimely filed. Respondent timely filed its expert and witness disclosures on October 5, 2020. Petitioner's witness disclosures were filed on October 19, 2020 and received by the Respondent the same day. Whether the period of time is calculated from the date Respondent's disclosures were filed (10/05/2020) or the date Petitioner represented it received them (10/08/2020), the Petitioner's witness disclosures were not submitted ten (10) days after the Respondent's disclosures.

Petitioner claims that the Court did not consider "mitigating circumstances" before its discovery orders. *See*, Amended Verified Petition, 18-19. This assertion is also unavailing. However, the documents complained of were produced in response to Defendant's Good Faith Letter, App. 95-100, as *Plaintiff's Supplemental Responses to Discovery*, App. 114-119.

It is clear from the record that Petitioner failed to timely and adequately supplement its discovery responses, it failed to provide Respondents with a 30(b)(7) representative and its witness disclosures were filed out of time.

A Writ of Prohibition proceeding must be reserved for only the most immediate and dire circumstances for this Honorable Court's intervention and should not be allowed to devolve into commonplace appeals from Petitioner's attempt to circumvent discovery orders. In short, "a writ of prohibition is an extraordinary remedy to be utilized in extremely limited instances." *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W.Va. 35, 45 n.34, 829 S.E.2d 35, 45 n.34 (2019). The Petitioner has failed to prove that the Court's actions were clearly erroneous as a matter of law; nor has the Petitioner carried the extraordinary burden of proving the lower court abused its discretion or exceeded its legitimate powers. Having failed in its proof, the Petitioner's Writs of Prohibition must be denied.

The Court's order to complete necessary and pertinent discovery and conduct additional mediation before issuing a ruling on the Petitioner's Dispositive Motions was neither erroneous nor an abuse of its discretion. Accordingly, this Court should refuse to issue the Writs of Prohibition and Mandamus.

V. CONCLUSION AND PRAYER

For the foregoing reasons, your Respondent respectfully prays that this Honorable Court decline to issue the Writs of Prohibition and mandamus.

Respectfully submitted,

Counsel for Respondent/Plaintiff



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2021, a true and accurate copy of the foregoing “**Summary Response to Amended Verified Petition for Writs of Prohibition and Mandamus**” was hand delivered to Respondent, The Honorable Miki Thompson, Judge and to counsel of record as follows:

Duane J. Ruggier II, Esq.

Evan S. Olds, Esq.

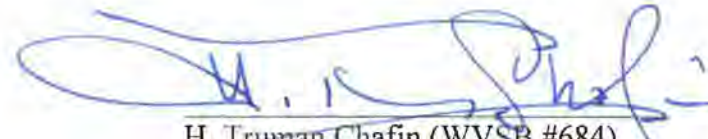
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