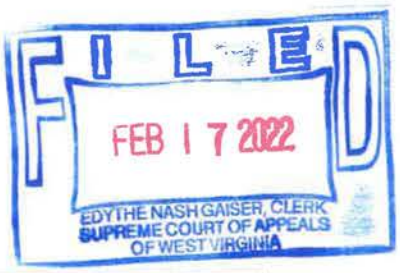

No. 21-0613

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

L&D INVESTMENTS, INC., a West Virginia corporation,
RICHARD SNOWDEN ANDREWS, JR.,
MARION A. YOUNG TRUST,
CHARLES A. YOUNG, DAVID L. YOUNG, and
LAVINIA YOUNG DAVIS, Successors of Marion A. Young,

Plaintiffs Below, Petitioners

v.

MIKE ROSS, INC., and
ANTERO RESOURCES CORPORATION,

Defendants Below, Respondents.

On Appeal from the Circuit Court of Harrison County, West Virginia
Honorable Thomas A. Bedell, Judge
Civil Action No. 13-C-528-2

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

Cases from Other Jurisdictions

Constitutional Provisions, Rules & Statutes

Other Sources

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PETITIONERS' REPLY BRIEF

I. RESPONDENT GUARDIAN *AD LITEM* HAS FAILED TO IDENTIFY ANY LEGAL BASES TO REBUT PETITIONERS'[1] REQUEST FOR ATTORNEY'S FEES AND COSTS PURSUANT TO THE COMMON FUND DOCTRINE

The Guardian *ad litem's* [hereinafter "GAL"] argument that the Common Fund Doctrine is not applicable in this case is clearly wrong and the Trial Court was mislead by relying on the 1971 *Willim* case. [see fn 2]. Without examining the hodgepodge excerpts of numerous cases incorrectly

[1] Petitioners are sometimes also referred to as Plaintiffs.

cited by the GAL, this Court only has to focus on the GAL's failure to examine the 1969 *Willim* case[2] which supports the awarding of attorney's fees and costs "...where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures to the benefit of all." *Id.* at Syl. 4. In *Willim I*, this Court reversed the Trial Court and remanded the case with "directions to award reasonable attorney's fees." Unfortunately, the *Willim I* case was not cited to the Trial Court by the GAL in the case below, and again in this Appeal, the GAL has not made any effort to discuss in his Response Brief, why *Willim I* is importantly different than *Willim II*, and thus, supplants any conclusion that *Willim II* prohibits recovery under the Common Fund Doctrine. Such is quite surprising as Petitioners significantly relied upon *Willim I* in their initial Brief arguing that *Willim II* actually recognized the Common Fund Doctrine was available under West Virginia law and clearly stated such when it opined that "the Supreme Court of the United States discussed the general rule that attorneys may be awarded reasonable compensation for legal services performed in producing or in preserving a 'common fund." *Id* at 52.[3] The attorney's who sought and were awarded fees, did not proceed under the common fund as they did not meet the criteria, so they sought such fees pursuant to an implied contract theory which was rejected by this Court. However, nowhere in the *Willim II* case did this Court reject the validity of the Common Fund Doctrine in our State's jurisprudence.

Willim I was not a class action but rather was an estate claim where many persons, both parties and unrepresented interested beneficiaries, had a stake in the outcome. It did not involve persons who had an interest in a common fund and would benefit from such created common fund.

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[2] *Security Nat. Bank & Trust Co. v. Willim*, 153 W.Va. 299, 168 S.E.2d 555 (1969) [*Willim* I]

[3] All subsequent cites are to South Eastern Reporter.

This Court's reference to "others of the same class" in *Willim II* did not mean a Rule 26 class action, but rather, that the individuals entitled to share in the recovery must have some common interest in the litigation wherein the common fund was created. In this case, the "Unknown Heirs" were more than interested non parties, or class members, they were actually named parties in the case below whose interests in the outcome of the litigation was as direct and important as the named Plaintiffs. Importantly, the "Unknown Heirs" have shared equally with the named Plaintiffs but have yet to pay their fair share of the fees and costs necessary to create the common fund from which the "Unknown Heirs" will share. To deny reasonable attorneys' fees and costs would unjustly enrich the "Unknown Heirs" to the detriment of others who took the risk and invested their time and money to secure the mineral royalties and mineral property which required 7 years of litigation to do so.

Because *Willim I* was relied upon in Petitioners' initial Brief, it should have been analyzed by the GAL with an explanation to this Court why it did not render *Willim II*[4] inapplicable and not a precedent upon which the Trial Court could rely to deny Plaintiffs reasonable attorneys' fees and costs under the Common Fund Doctrine. The effect of *Willim I*'s effect on this Appeal is significant as the Trial Court adopted the GAL's reliance on *Willim II* which was clear error, especially considering the plethora of other cases cited by Plaintiffs that supported the recognition of the Common Fund Doctrine in our State's jurisprudence. Such failure by the GAL to do so is tantamount to waiver or abandonment, or at least the assumption "that the respondent agrees with the petitioner's view of the issue." [Rule of Appellate Procedure 10(d)].

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[4] *Security National Bank v. Willim*, 155 W.Va. 1, 180 S.E.2d 46 (1971) [*Willim II*]

Additionally, the GAL instead of condemning the Restatement of Restitution [5] as not being adopted in West Virginia, which is incorrect and will be discussed *infra*, the GAL should have considered the Restatement's definition of common fund which is "money or other property in which two or more persons (the "beneficiaries") are entitled to share by reason of their common or parallel interests therein." The "Unknown Heirs" fit this definition to a "tee" The named Plaintiffs are all descendants of the Andrews' Family as are the "Unknown Heirs." Not only are they of the "same class" i.e. all related by blood or marriage, and all are entitled to a percentage of the common fund created by Plaintiffs, but the "Unknown Heirs" also have recovered their percentages in the 1000 acre mineral property which was also made possible by Plaintiffs and their counsel's actions.[6] See generally, *Frisenda v. Floyd*, 308 F. Supp. 3d 869, 874 (ND WV 2018) ["Courts in West Virginia have authority to impose attorneys' fees and costs on a common fund:" (citations omitted)].

A. The Common Fund Doctrine is Not Limited to Class Actions:

Just as the GAL's Argument I(a) should be rejected by this Court, the GAL's reliance on "snippet's" from United States Supreme Court cases cited by Petitioners, which have been taken out of context, do not support the GAL's assertion that the Common Fund Doctrine only applies to **"certified class"** actions under Rule 23 of the Rules of Civil Procedure. [GAL's Response Brief p.12.]. Such is absurd and not the law. Unfortunately, the Trial Court adopted such argument. [JA

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[5] Restatement of the Law 3d, Restitution and Unjust Enrichment, § 29 Common Fund [hereafter: Restatement].

[6] Plaintiffs counsel negotiated in the settlements that formed the common fund that the "Unknown Heirs" royalties would be paid into court and that their mineral property interests would be confirmed. [JA 709 at ¶ 3 & 4 & 728 ¶ 6].

0097 at ¶8 & 12]. The type of case does not determine the application of the Common Fund Doctrine. If a fund is created from litigation that benefits persons similar to the plaintiffs, like the "Unknown Heirs" here who were named parties, which benefits such persons, then the Common Fund Doctrine is applicable. [See *Sprague*, Pet. Brief, p.17-18]. The cases cited in the GAL's Brief at 1(b), do not support the GAL's position. Moreover, the GAL makes an argument that the adoption of the Rules of Civil Procedure has altered the common law adoption of the Common Fund Doctrine. However, in trying to understand the GAL's Argument, it appears that the GAL "bootstraps" his theory that only Rule 23 class actions are worthy of common fund application by referencing the Rule itself which is silent on such matter. No relevant case law is cited for this strange proposition. Therefore, it should be rejected.

The GAL also criticized Petitioners' citations of two cases[7] where appellate courts recognized that application of the Common Fund Doctrine is not limited to class actions alone. Both cited cases are examples of such common law positions, as well were Plaintiffs' citation of the MDL cases [Pet. Br. p 27, fn 77]. The GAL discussed the two cases but only described the nature of the causes of action but not the part of the Opinions relevant to this Appeal. In each case, the Appellate Courts observed that the application of the Common Fund Doctrine was not limited to class actions. The point to be made is not that either of those cases control the decision of this Court, but rather, that most, if not all, jurisdictions hold that the Common Fund Doctrine is not limited to any particular procedural posture of a case, but rather, its application depends on the facts. The GAL

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[7] These two cases, *Valder L. Offs. v. Keenan L. Firm*, 212 Ariz. 244, 249, 129 P.3d 966, 971 (Ct. App. 2006) and *Morris B. Chapman & Ltd. v. Kitzman*, 193 Ill. 2d 560, 573, 739 N.E.2d 1263, 1272 (2000) were cited in Petitioners' Brief at Footnote 76 as "e.g.", meaning they were cited as examples, not precedent.

misunderstands the meaning of "creating a common fund" and what is meant by "suing in behalf of himself and others of the same class." See, *Willim II.* The GAL asserts that such language refers only to a certified class action under Rule 23, but such is grossly incorrect. The Restatement defines in Comment d the meaning of "same class" as:

> "***Persons similarly situated.*** Restitution is available under § 29 **when benefits are secured to persons similarly situated, in such relation to the common fund that a benefit to one is necessarily accompanied by a benefit of the same character to another.** Common or parallel interests giving rise to this relationship exist between multiple owners, multiple creditors, and multiple claimants in a great variety of situations." (emphasis added)

The Restatement also defines "common fund" as "money or other property in which two or more persons (the "beneficiaries") are entitled to share by reason of their common or parallel interests therein." The "Unknown Heirs" fit this definition to a "tee." *Frisenda, supra.* citing *Roach v. Wallins Creek Collieries Co.*, 111 W.Va. 1, 160 S.E. 860 (1931).[8] Accordingly, the GAL's assertion that only Rule 23 and trust cases are available for common fund application is seriously flawed, and not the law in West Virginia or anywhere else.

B. The GAL's Argument That Plaintiffs' Counsel Was Required to Have a Fee Agreement, Express or Implied, for the Common Fund Doctrine To Apply Defies the Very Reason for the Doctrine's Existence:

Again, the GAL's Argument is hard to follow because of course if an attorney has an express fee contract, written or oral, then the Common Fund Doctrine would not be invoked as the contract

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[8] The District Court in *Frisenda* also cited *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) which quoted *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) for the position that "...when an insured retains her own attorney to recover funds from a wrongdoer, she often creates a "common fund" that enures to the benefit of her insurer."; see also Argument 1(A) in Petitioners' Brief.

would control. Such begs the question. Nor is the GAL's assertion that because the "Unknown Heirs" were made Parties to the case below as Defendants, that some how erases the advocacy by Plaintiffs and their counsel on behalf of the "Unknown Heirs" that resulted in the creation of the common fund for their benefit. Of course, if the "Unknown Heirs" had been known they could have retained their own counsel or joined as Plaintiffs, but most assuredly, one cannot have a fee agreement with someone who is unknown. Rule 1.5 of the Rules of Professional Conduct does not address fee awards based on common funds created in litigation, nor should it as such is a creature of equity. The reason is simple. Regardless of the kind of case a common fund award is sought and/or granted, there are sufficient safeguards regarding fees as there are judicial officers, both at the trial and appellate levels, overseeing the proceedings. The basis for an award from a common fund must meet the criteria which include a review of the actions in the litigation that produced the common fund and the benefit to those who receive such benefits and their common law duty to "pay their fair share." It is not necessary to again rehash all of the effort, both in attorney time and litigation costs, as well as the very significant risk of losing the entire case, that Plaintiffs and their counsel undertook on behalf of the "Unknown Heirs." Such efforts ultimately created the more than $2 million dollar common fund that has enriched the "Unknown Heirs" and that is why Plaintiffs are entitled to receive a fair fee and costs from that common fund.[9]

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[9] It is ironic that the GAL makes such arguments while he has already been paid $350 per hour, totaling $23,995.00 as of June 2021 [JA 666-72] and has incurred a $9,000.00 expert fee at $375 per hour for the calculation of the anticipated accrued prejudgment interest; such fee was incurred before even succeeding on the Motion permitting the recovery of prejudgment interest which Motion was originally filed by Plaintiffs' counsel with the prejudgment interest already calculated. [JA 370-90]; no doubt there will be significantly more GAL fees and expenses for this Appeal and other Court matters yet to come, all draining the common fund created for the "Unknown Heirs"; it is very likely that the GAL fees and costs will well exceed $100,000.00 which begs the question of why is such necessary?

C. The GAL's Assertion that the American Rule Does Not Support Fee Shifting Is Generally Correct But That is Why the Common Fund Doctrine Was Developed:

The argument and cited cases by the GAL regarding the American Rule is misplaced. While the general rule or as referred to as the American Rule, is that each party bears their own attorney's fees and costs. However, there are many exceptions to such Rule which includes the Common Fund Doctrine. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 275 (1975)[holding that the common fund doctrine is an exception to the American rule]. The Court in *Alyeska* characterized the fee shifting Common Fund Doctrine as follows:

> "To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums permitted by § 1923. In *Trustees v. Greenough*, 105 U. S. 527 (1882), the 1853 Act was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees,, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed." *Id* at 257-58.

The GAL's bald statement that the American Rule is still in place may be true, but it is not germane or controlling the issue before this Court which is whether the Trial Court committed error by failing to recognize the application of the Common Fund Doctrine in the case below. It did and such should result in reversal of the Trial Court's Order and remanding for the Trial Court to set a reasonable attorney's fee and litigation costs from the common fund created by Plaintiffs and their counsel.

D. The Restatement of Restitution has Been Favorably Cited and Relied Upon by This Court:

The GAL also made a sweeping assertion that the Restatement has not been adopted in West

Virginia. Such is a clear misunderstanding of the Restatements of the Law and how they are used by jurists and attorneys. The Restatements are treatises promulgated by the American Law Institute that set forth suggested substantive rules pertaining to specific areas of the law, such as contracts, torts, the law governing lawyers and many other relevant legal topics. They are usually not adopted in their entirety as are uniform statutes. Rather, Restatements of the Law are recognized by courts on a case by case basis, usually quoting only a specific section of the relevant Restatement that deals with an issue before that court. Although not cited by the GAL, this Court has cited the Restatement of Restitution numerous times[10] including as recently as 2015 in the *Heartwood Forestland* case.[11]

E. The Trial Court's Order Denying Plaintiffs' Counsel to Act on Behalf of the "Unknown Heirs" by Holding Escheated Funds Did Not Impact or Resolve the Petitioners' Request for Fees and Costs Under the Common Fund Doctrine:

The GAL asserts that the Trial Court's Omnibus Order finding that Plaintiffs' counsel had no fiduciary relationship with the "Unknown Heirs" permitting counsel to hold in his IOLTA Trust account any recovered escheated funds belonging to the "Unknown Heirs" is determinative of the common fund issue is unsound. [Respondent Br. p.4-5]. The Defendant Mineral Producers had objected to Plaintiffs seeking prejudgment interest on behalf of the "Unknown Heirs" as understandably they did not want to pay it. Plaintiffs filed a Motion for prejudgment interest on behalf of the "Unknown Heirs" on December 8, 2020 with the permission of the Trial Court. [JA 370-90]. This is contrary to the GAL's statement that such Motion was filed in conflict with the

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[10] A quick search reveals that this Court has cited the Restatement of Restitution at least 19 times.

[11] *Heartwood Forestland Fund IV, LP v. Hoosier*, 236 W.Va. 480, 781 S.E.2d 391 (2015).

Trial Court's Omnibus Order [Respondent Br. p.5, JA 324-25]. Such is inaccurate as the Trial Court had previously approved the filing of such Motion by Order after the November 6, 2020 Status Conference. [JA 362-63]. While the Trial Court in its Omnibus Order determined that Plaintiffs' counsel could not seek prejudgment interest from the Defendant Mineral Producers pursuant to the Common Fund Doctrine, the Trial Court recognized that such was a separate matter from Plaintiffs' Motion for prejudgment interest for the "Unknown Heirs"[322- 25]. Ultimately, because of the Defendant Mineral Producers objections to Plaintiffs seeking such prejudgment interest, the Trial Court believed that the best course was to appoint a guardian *ad litem* to do so, which Plaintiffs agreed but was opposed by all the Defendants Mineral Producers [JA 441-45].

F. The GAL's Position that He Must Resist Petitioners Request for Fees and Costs from the Common Fund Is Misplaced; a GAL is Duty Bound to be Fair in His Assessments and Follow the Law:

A guardian *ad litem* holds a special place in our jurisprudence. A guardian *ad litem* is not a partisan advocate like a retained attorney who must abide by his or her client's desires as long as such directions are lawful and ethical. The GAL acts as an investigator for the court. The GAL investigates all aspects of the case, writes a report about his or her findings, and also gives recommendations to the court as to what should happen. That unfortunately this has not been the posture of the GAL in this proceeding.

The GAL has not reviewed the facts in this case in an unbiased manner. Instead, the GAL as from the beginning has not investigated the law and then made a fair and reasonable proposal to the Trial Court. The GAL's only goal seems to be that the Plaintiffs and their counsel not be compensated for the creation of the common funds of more than $2.2 million dollars. Such is

inconsistent with the Order of the Trial Court and the duties of a guardian *ad litem*. [JA 441-46].

The GAL should not have accepted this appointment from the Trial Court if he had a predisposed end game already in place. Such is either due to bias, or direction, neither of which would be appropriate. The GAL should have reviewed the facts and then formulated what would be a fair and reasonable position under the law, rather than adopt a win at all costs attitude which is both contrary to his duty as a GAL to be fair and impartial, as well as it being costly to the "Unknown Heirs" as such one sided advocacy is depleting the "Unknown Heirs" common fund by every hour spent trying to deprive Plaintiffs' what they are clearly entitled to under the law. While reasonable minds may differ on the final amount of fees and costs to be granted to Plaintiffs' counsel, reasonable minds cannot in good conscience advocate that Plaintiffs and their counsel should receive nothing. Such a posture is especially perplexing when the reasons given are not convincing.

For instance, the GAL states that he must represent the interests of the "Unknown Heirs." With that said, it is clear that the GAL has no idea what the "Unknown Heirs" would request as the GAL has never met any of them. The GAL is substituting his own proclivities in place of the "Unknown Heirs." It is just as likely that the "Unknown Heirs" would have been more than willing to pay their fair share of fees and costs necessary to have the common fund generated rather then get nothing as there was no downside for them when Plaintiffs counsel accepted the case on a contingent fee. The proof is evident as every named Plaintiff did so. It is pure speculation for the GAL to decide that the "Unknown Heirs" would want the persons who brought into being the funds that they may share, to receive nothing. It surely is unjust to advocate such a result. Such would be the height of selfishness.

The GAL has also unnecessarily interjected that Plaintiffs' counsel was an incorporator of

Plaintiff L&D Investments, Inc. which incorporation occurred in 1980. "The law presumes ... that corporations are separate from their shareholders" and is separate and apart from those who own it.[12] From that information, the GAL speculated that Plaintiffs' counsel "has recouped financial benefit for his investment company." [GAL Response Br. p. 7]. Such information was never a part of the case, or found anywhere in the Record, and the GAL has not cited any Joint Appendix document confirming such assertion as such does not exist as it was never relevant to this litigation, and still isn't.[13]

Finally, the GAL, without any legal support, determined that the MDL cases cited by Plaintiffs were "not analogous to the present case and provide no support for Petitioners' Counsel's arguments." Nothing could be farther from the truth. The MDL cases cited by Plaintiffs are squarely on point and highly germane to the very issue before this Court.[14] All three of the MDL cases were recent, 2018, 2020 and 2021. All three cases stand for the proposition that the creation of a fund that others can share entitles the plaintiffs and counsel whose work created the "pot of money" to receive reasonable attorney fees and costs from that common fund or "pot of money."[15] For instance, in the

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[12] See generally, *Southern Electrical Supply Co. v. Raleigh County National Bank*, 173 W.Va. 780, 320 S.E.2d 515 (1984) and *Sanders v. Roselawn Memorial Gardens*, [Inc.,] 152 W.Va. 91, 159 S.E.2d 784 (1968).

[13] The only information the GAL has regarding Plaintiff L&D's was from the WVSOS website showing that on October 16, 1980, that Plaintiffs' counsel was an incorporator along with Lucie A. Romano, who happened to be Plaintiffs' counsel's dear Mother; L&D was started to buy a run down apartment in Morgantown so Plaintiffs' counsel's two younger brothers, Senator Mike Romano and John Romano, would be encouraged to attend college as their Father had died in 1978 and their Mom was worried that they would be gypsies; it worked and both little Brothers turned out OK, so far!

[14] Petitioners cited the MDL cases at page 27, footnote 77 in their initial Brief.

[15] *In re Roundup Products Liability Litigation*, 2021 WL 3 161590 at *2 (N.D. Cal. 2021); *In re GM Ignition Switch Litigation*, 477 F.Supp.3d 170, 183, 192 (S.D. N.Y. 2020); *Independent Living Center of Southern California, Inc. v. Kent*, 909 F.3d 272, 285 (9th Cir. 2018).

In re Roundup Products case, the District Court opined that, "The common fund exception recognizes that a plaintiff who litigates and recovers a specific piece of property or pot of money—one that benefits a discrete group of people in addition to themselves—is entitled to reasonable attorneys' fees from that recovery." *Id.* at 7. The 9th Circuit held in *Independent Living* case that "[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id.* at 284. And in the *General Motors* MDL, the District Court held that:

> "As this Court has previously explained, complex aggregate litigation often raises a classic free-rider problem. A subset of plaintiffs' lawyers do the lion's share of the work, but that work accrues to the benefit of all plaintiffs. If those other plaintiffs were not required to pay any costs of that work, "high-quality legal work would be under-incentivized and, ultimately, under-produced. To solve this problem, courts frequently invoke what is known as the "common-benefit doctrine" and impose assessments on the recoveries of those who benefit from the work done for the benefit of all;" (citations omitted).

Once again the GAL's attempt to distinguish Petitioners' case support is to no avail.

Conclusion:

Petitioners and their counsel, Plaintiffs below, are entitled to a fair and reasonable attorney's fee and litigation costs. The Trial Court misinterpreted the law regarding the Common Fund Doctrine's applicability to the undisputed facts of this case. Accordingly, this Honorable Court should reverse the Trial Court, find that the common law of this State recognizes the Common Fund Doctrine and such doctrine is applicable to the undisputed facts and remand the case to the Trial Court to grant reasonable attorney's fees and litigation costs consistent with the law regarding the

determination of such awards.[16]

Respectfully submitted,
Plaintiffs Below/Petitioners,

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Charles A. Young,
David L. Young, and
Lavinia Young Davis,
Successors of Marion A. Young Trust,
Charles Lee Andrews, IV, and
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[16] While the GAL argued that Plaintiffs and their counsel should receive no award such is without any basis; moreover the Trial Court itself has stated and held that the "going rate" in awarding attorney fees in West Virginia when the case is taken on a contingent basis is "one third...is fair, adequate, and reasonable." citing *Davis v Ruskin*. [JA 0064 at 0066].

CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 17th day of February, 2022, I served the foregoing "PETITIONERS' REPLY BRIEF" upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to him at his office address:

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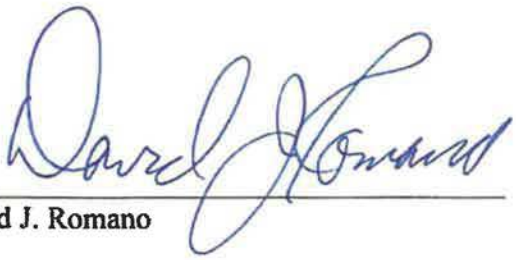

David J. Romano