No. 22-723

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

EXECUTIVE COMMITTEE OF THE REPUBLICAN PARTY OF OHIO COUNTY WEST VIRGINIA, ELGINE McARDLE, ROBERT LUCHETTI, GREGORY WILLIAM SMITH, GEORGE CRAIG MEYER, CARLEE J. DITTMAR, DEBORAH MARIE SMITH, and FAITH ELIZABETH MEYER.,
Petitioners

v.

ADOLPH SANTORINE, JR.,
Respondent.

CASE NO. 22-723

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

PETITIONER'S REPLY BRIEF

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TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

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REPLY TO "BRIEF OF APPELLEE"

I.

RESPONDENT'S "BRIEF OF APPELLEE" FAILS TO RESPOND TO PETITIONER'S OPENING BRIEF

Petitioner's opening brief contained one sole assignment of error; that being, whether the Circuit Court abused its discretion in granting mandamus relief. Petitioner's opening brief set forth the applicable standard of review for an order which grants mandamus relief. Unfortunately, nothing contained in Respondent's "Brief of Appellee" even resembles a specific response to this assignment of error. In fact, the cases cited by Respondent as the applicable standards of review did not involve review of a mandamus order.[1]

West Virginia Rules of Appellate Procedure, **Rule 10(d)** specifically states: (emphasis supplied)

> Unless otherwise provided by the Intermediate Court or the Supreme Court, **the argument section of the respondent's brief must specifically respond to each assignment of error**, to the fullest extent possible. **If the respondent's brief fails to respond to an assignment of error, the Intermediate Court or the Supreme Court will assume that the respondent agrees with the petitioner's view of the issue.**

Based upon the Respondent's failure to specifically respond to Petitioner's assignment of error regarding mandamus relief, Petitioner submits that this Court can assume that the Respondent agrees with Petitioner's view of this issue. In the event, this Court interprets Respondent's Question #2 and Question #3 as a response to Petitioner's Mandamus argument, Petitioner replies as follows:

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[1] *Public Citizen, Inc. v. First Natl Bank in Fairmont*, 198 W.Va. 329 (1996) concerned a review of reasonable commercial standards applicable to the business of the bank, and negligence. *Adkins v. Stacy*, 589 S.E.2d 513 (W.Va. 2003) concerned an encroachment case wherein the Court entered a judgment notwithstanding the verdict after a full trial.

As to Question #2: Did Judge Simms abuse his discretion in resolving the factual issues presented at the hearing on the mandamus petition? The answer is YES

As indicated in Petitioner's opening brief "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the Santorine to the relief sought; (2) a legal duty on the part of respondent to do the thing which the Santorine seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

The record fails to establish any facts equivalent to a "clear legal right." In fact, the record demonstrates anything but a clear legal right. An entire hearing was held to determine where Respondent resided before the election, during the election, and after the election. The record demonstrated that the Ohio County placed Respondent's residence within Magisterial District I, claimed it made an error, then placed Respondent's residence within Magisterial District II ***post-election***. The fact that a hearing was required to make a factual determination, in and of itself, demonstrates the lack of a "clear legal right" to serve in a district where one does not reside. Respondent goes to great lengths to discuss election law but fails to address Respondent's eligibility to serve based upon his residence. The record demonstrates that factual confusion existed as to Respondent's residence. [See Petitioner's opening brief].

As to Question #3: Did Judge Simms make clearly erroneous conclusions of law in resolving legal issues presented at the hearing on the mandamus petition? The answer is YES

As a preliminary matter a court cannot make a clearly erroneous conclusion of law. As such, Respondent's third question presented fails to properly couch his argument for this appeal. Notwithstanding Respondent's confusion on appellate review standards, nothing contained within the Circuit Court's order begins to apply the proper standard to a complaint which seeks mandamus relief. The Circuit Court's order fails to cite facts upon which it relies to conclude that 1)

Respondent had a "clear legal right" to relief, 2) Petitioner had a legal duty to act and 3) the absence of another adequate remedy ~ all as required by West Virginia law. [See Petitioner's Opening Brief].

II.

APPELLEE'S BRIEF APPEARS TO BE A CROSS-ASSIGNMENT OF ERROR

In "Appellee's Brief" Respondent dedicates an entire argument to this Court's jurisdiction to hear Petitioner's appeal claiming that the mandamus order was "not a final order," and appears to assert a cross-assignment of error.

West Virginia Rules of Appellate Procedure Rule 10(f) governs cross-assignments of error and specifically states:

> The respondent, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof in the manner provided in subsection (c) of this Rule. Such cross-assignment may be made notwithstanding the fact that the respondent did not perfect a separate appeal within the statutory period for taking an appeal. **If the respondent's brief contains cross-assignments of error, the cover page of the brief must clearly so reflect.** The petitioner may respond to the cross-assignment of errors in the reply brief.

As a preliminary matter, Respondent's cover page labels his document as "Brief of Appellee" as opposed to Respondent's Response to Petitioner's Brief. As such, Respondent's cover page neither clearly asserts "Cross Assignments of Error" nor "Responsive Brief." To protect Petitioner's position in the event Respondent's pleading is considered a cross assignment of error, Petitioner respectfully submits that Respondent's Motion to Dismiss fails.

III.

PETITIONER'S RESPONSE TO MOTION TO DISMISS

Respondent devotes an entire argument in support of a Motion to Dismiss when Respondent has conceded that the "Mandamus relief and a declaratory judgment have been resolved." [See Respondent's Motion to Dismiss Appeal – October 20, 2022]

As stated in Petitioner's Response to the Motion to Dismiss the Appeal, the sole issue for appeal is the Circuit Court's ruling on the Motion to Dismiss. Petitioner incorporates by reference its previously filed Response.

WHEREFORE, for the reasons stated within Petitioner's opening brief, Respondent's failure to specifically respond to the legal requirements of a mandamus petition, and Respondent's apparent filing of a cross appeal without conforming to the West Virginia Rules of Appellate Procedure, Petitioner respectfully requests that the Circuit Court's issue of mandamus be set aside, and the Petitioner be granted attorneys fees for the prosecution and defense of this appeal.

Respectfully submitted,
Petitioners, individually and collectively
as the OCREC

By 
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CERTIFICATE OF SERVICE

I, Elgine Heceta McArdle, do hereby certify that a copy of the foregoing PETITIONER'S REPLY was served upon the below listed parties via ELECTRONIC FILING this 4th day of January 2023

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