

NO. 33707

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

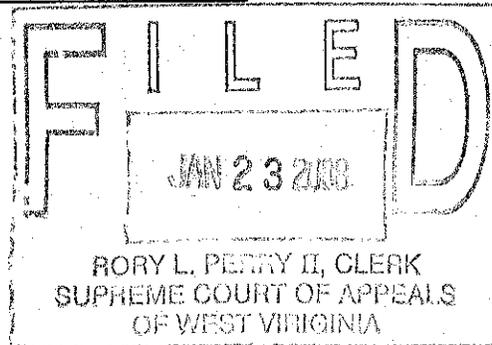
BERNARD J. FOLIO, and
GRANDEOTTO, INC.,

Appellants,

vs.

HARRISON-CLARKSBURG HEALTH
DEPARTMENT and HARRISON-
CLARKSBURG BOARD OF HEALTH,

Appellee.



FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

RESPONSIVE BRIEF OF APPELLANT ON APPEAL

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BRIEF OF BERNARD J. FOLIO AND GRANDEOTTO, INC. ON APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA, GREETINGS

I.
RESPONSE TO BRIEF OF APPELLEES

It is respectfully submitted that the Brief of the Appellees contains no new assertions or defenses. It focuses on the fact that the trial court made specific rulings in a detailed Final Order, and the Appellants certainly agree with that and would further even assert that the trial Court obviously put a great deal of thought into its final rulings below. However, that doesn't mean that the trial court is correct in those rulings, with sincere respect. Basically, the Appellants stand upon their Brief on Appeal filed in this matter, though it may be helpful to point out the following in contradiction to the Appellees' Brief.

One basis for Appellants' assertion that competitive bidding was required is because the Appellees receive Federal, State and local funding and must therefore conform to the general rules of acquisition and procurement of those funding agencies – the recipient (“lesser”) cannot have more freedom with the money than the grantor (“greater”). If a governmental or quasi-governmental agency receives funding from other governmental entities, it must use a procurement process that is at least as comparatively rigorous as that of the funding agency. This doctrine is seen daily across all governmental agencies including, for example, local boards of education which must comply with attendance, nutrition, disability accommodation, and achievement standards of the federal and state governments because they receive funding from those entities. Also important in this competitive bidding requirement issue is the separate concept expressed in *West Virginia Utility Contractors Association v. Laidley Field*

Athletic and Recreational Center Governing Board, 164 W.Va. 127, 260 S.E.2d 847 (1979)

wherein that board argued that it had no legal duty to advertise for competitive bids. However, that aggrieved plaintiff “[A]mong other points, ... prayed that the court declare that contracts entered into by the Laidley Field Athletic and Recreational Center Governing Board be awarded only after the Board complied with the competitive bidding requirements imposed by law upon the Governing Board's creating agencies, The Board of Education of the County of Kanawha, The County Commission of Kanawha County, and The State of West Virginia by the Department of Finance and Administration.” *Id* at 127 (emphasis added). The Circuit Court of Kanawha County dismissed the action, but the Supreme Court reversed and remanded the case. The ruling of that case has not been overturned and is therefore precedential. Also, this High Court held the City of Cameron to the use of competitive bidding regarding resurfacing streets in *Burgess v. City of Cameron*, 113 W. Va. 127, 166 S.E. 113 (1932). See Syl. Pt. 1.

In the instant case, the “creating agencies” (of the combined county-municipal Board) are the Harrison County Commission and the City of Clarksburg (and the State of West Virginia by statute), each of which would have had to advertise to lease office space or otherwise acquire real property. The higher purpose here is to make and keep local government beyond question of impropriety. “Published notice for competitive bids was provided by the legislature as a safeguard to the taxpayer against private avidity and official indifference. This beneficial provision has no value if it can be disregarded. The evils which imperatively demand these restrictive statutes are of common notoriety. They can be held in check only by regarding as

mandatory the statutory provisions designed to circumvent them.” *Burgess v. City of Cameron*, 113 W.Va. 127, 133, 166 S.E. 113 (1932)(emphasis added). Requiring the Board of Health to comply with the competitive bidding procedures required of its creating agencies is not much of a burden compared to the return in public interest and trust. The statute which authorizes the Board to act in acquiring facilities is West Virginia Code, §16-2-11(a)(4) and imposes the power and duty to “Provide equipment and facilities for the local health department that are in compliance with federal and state law.” Certainly, the State of West Virginia and the federal government have to utilize competitive bidding processes in obtaining office space.

The trial court’s *legal finding* that a showing of actual fraud must be made rather than constructive fraud is errant and wholly ignores the line of cases initiated in *Miller v. Huntington, etc., Bridge Co.*, 123 W. Va. 320, 15 S.E.2d 687 (1941). Then, the trial court, with respect, then made what could be called a “just in case” *factual ruling* that there was no evidence of constructive fraud, which issue should have been decided by a trier of fact.

When this is all combined with the arbitrariness of the selection process, the confoundedness of the actions of the Appellees is apparent.

Significant Genuine Issues of Material Fact Exist

The Appellants had a definite and unequivocal right to bring, maintain and pursue this action under several theories of law and equity. There were multiple genuine issues of material fact which should have survived summary judgment, the main one being

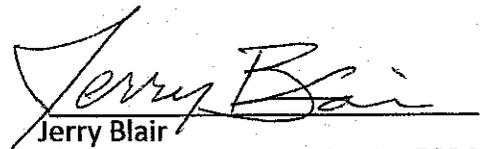
whether the selection process was arbitrary or worse (constructive fraud). This is a factual question and not a legal question.

Therefore, the lower court acted erroneously and deprived your Appellants of significant rights by disposing of Appellants' claims on summary judgment. The question is whether a local combined board of health should be permitted to relocate its facilities in such a manner without a trier of fact being able to question it. Appellants respectfully assert that it should not be.

PRAYER FOR RELIEF

Your Appellants respectfully request that this matter be remanded to the Circuit Court of Harrison County West Virginia and be permitted to proceed to trial by jury, and that they be granted any and all other necessary relief.

BERNARD J. FOLIO and
GRANDEOTTO, INC.,
By Counsel,



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CERTIFICATE OF SERVICE

I, Jerry Blair, hereby certify that I have on this 22nd day of January 2008, given notice of the filing of the foregoing "Appellants' Responsive Brief On Appeal" by placing a true copy of the same, in the US mail, postage prepaid, in envelopes addressed as follows:

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