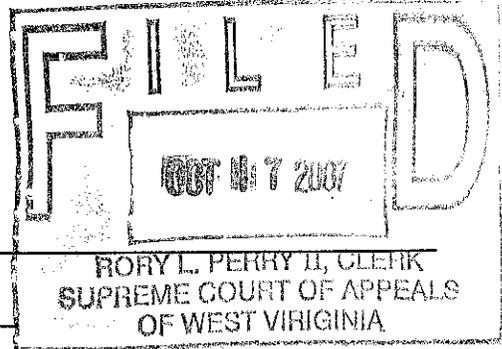


No. 33504



IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBIN L. CROFT, JILL A. ARMITAGE, and BRANDY G. MCCOY,

Appellants,

v.

TBR, INC., d/b/a/ TJ'S SPORTS GARDEN AND RESTAURANT,
TASHE JOVANNI RADEVSKI, SHANE KULPA, and ERIE INSURANCE
PROPERTY & CASUALTY COMPANY,

Appellees,

On Appeal From
The Circuit Court of Ohio County, West Virginia,
Hon. James P. Mazzone, Judge

APPELLANTS' BRIEF IN SUPPORT OF APPEAL

ROBIN L. CROFT, JILL A. ARMITAGE,
AND BRANDY G. MCCOY, Appellants,

Submitted by Counsel for the Appellants:

Michael J. Olejasz, Esquire
WV ID #9273
FERRO & OLEJASZ
1144 Market Street, Suite 202
Wheeling, WV 26003
(304) 233-6000

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Introduction

The Petitioners filed a Motion for Attorney's Fees and Costs in accordance with Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004) after each had duly accepted her individual Offer of Judgment served upon them pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. Each of the subject Offers were identically verbatim, but for the names of the three (3) Plaintiffs. All of the Offers were silent as to the inclusion of "costs then accrued". All of the Offers were silent as to attorney's fees and costs. Rule 68(a) of the West Virginia Rules of Civil Procedure entitles a claimant to recover costs accrued at the time that an Offer of Judgment is extended. After Responses and Replies to said motion were filed and served, a Hearing on the Plaintiffs' motion was held before the Honorable James P. Mazzone, the Judge presiding over the consolidated civil action. After reviewing the Offers of Judgment, Notices of Acceptance, the briefs of the parties, and entertaining oral argument, the Court ruled that the wording of the Offers of Judgment were "broad enough" to include attorney's fees and costs and thus denied the Consolidated Plaintiffs' motion, precluding any further recovery from the figure stated in the Offers, but for post-judgment interest. Please see, *Judgment Order* entered December 15, 2006 and *Transcript* at p. 26, lines 16-20 and p. 27, lines 3-10.

Statement of Facts

The Appellants had filed independent civil actions as sole Plaintiffs in the Circuit Court of Ohio County, West Virginia, against Defendants insured by Erie Insurance Property and Casualty Company. Robin L. Croft filed a Complaint against TBR, INC. and Tashe Jovanni Radevski, Civil Action No. 03-C-472, asserting claims under the West

Virginia Human Rights Act, and alleging Intentional Infliction of Emotional Distress as a result of the violation of the Act, specifically sexual harassment motivated by gender, Negligent Infliction of Emotional Distress as a result of the violation of the Act, specifically sexual harassment motivated by gender, and Battery because of the uninvited touching during the sexual harassment motivated by gender. Jill A. Armitage filed a Complaint against TBR, INC. and Tashe Jovanni Radevski, Civil Action No. 04-C-49, asserting claims under the West Virginia Human Rights Act, and alleging Intentional Infliction of Emotional Distress as a result of the violation of the Act, specifically sexual harassment motivated by gender, Negligent Infliction of Emotional Distress as a result of the violation of the Act, specifically sexual harassment motivated by gender, and Negligence. Brandy G. McCoy filed a Complaint against TBR, INC., Tashe Jovanni Radevski, and Shane Kulpa, Civil Action No. 04-C-281, asserting claims under the West Virginia Human Rights Act, Intentional Infliction of Emotional Distress as a result of the violation of the Act, specifically sexual harassment motivated by gender, Negligent Infliction of Emotional Distress as a result of the violation of the Act, specifically sexual harassment motivated by gender, and Battery because of the uninvited touching during the sexual harassment motivated by gender. All three (3) of the Plaintiffs are represented by the same undersigned Attorney, Michael J. Olejasz, Esquire. Subsequently, all three of those civil actions were consolidated under the *Croft* action upon motion of the named Defendants. Erie Insurance Property and Casualty Company filed a Motion to Intervene in the consolidated action. Said motion was not ruled upon.

On August 30, 2006, pursuant to Rule 68 of the West Virginia Rules of Civil Procedure, Plaintiffs Robin L. Croft, Jill A. Armitage, and Brandy G. McCoy accepted

the individual Offers of Judgment dated August 28, 2006, served upon each of them respectively through counsel that were hand delivered on that date, to be paid by Erie Insurance Property and Casualty Company on behalf of the Defendants. The original Offers of Judgment and Notices of Acceptance were then filed by Plaintiffs' counsel as provided by the Rule. Those Offers of Judgment allowed for Judgment to be taken for each individual Plaintiff for "Thirteen Thousand Dollars and No Cents (\$13,000.00)", or a combined total of Thirty-Nine Thousand Dollars and No Cents (\$39,000.00) for the consolidated Plaintiffs. Those subject Offers of Judgment read as follows:

RULE 68 OFFER OF JUDGMENT TO [PLAINTIFF'S NAME]

Pursuant to the provisions of Rule 68 of the West Virginia Rules of Civil Procedure (2006), the defendants, TBR, Inc., d/b/a TJ's Sports Garden and Restaurant, Tashe Jovanni Radevski, and Shane Kulpa hereby allow judgment to be taken against them by the plaintiff, [Plaintiff's Name], for full satisfaction and dismissal of all claims which have been and/or could have been asserted by plaintiff and any other person or entity in this civil action, including any subrogation claims/liens had by any person or entity for payments made to or on behalf of plaintiff, in the total amount of Thirteen Thousand Dollars and No Cents (\$13,000.00), to be paid on defendants' behalf by Erie Insurance Property and Casualty Company.

This offer of judgment is made for the purposes specified in Rule 68 and is not to be construed either as an admission that the defendants are liable in this action, or that plaintiff has sustained any damages. According to Rule 68 (c), if this offer is not accepted within ten days after the service of the offer, it shall be deemed withdrawn. Should plaintiff not accept defendants' offer herein within the expiration of the ten day period, and should the judgment finally obtained by plaintiff against defendants not exceed Thirteen Thousand Dollars and No cents (\$13,000.00), defendants will, pursuant to Rule 68(c), seek an Order from the Court requiring plaintiff to pay all costs incurred in the defense of this case subsequent to the date of this offer.

Dated this 28th day of August, 2006.

Each of the accepted Offers of Judgment is silent on the issues of attorney's fees and costs of the Plaintiffs. Each of the Plaintiffs entered into contingency fee contracts

with their attorney. Rule 68(a) provides for the recovery of costs incurred at the time Judgment is offered. Attorney's fees are considered costs when an action is brought under a fee shifting statute, such as the West Virginia Human Rights Act. Plaintiffs were therefore entitled to their reasonable attorney fees and costs, or a total of \$13,000.00 in attorney's fees and \$2,598.33 in actual costs, in addition to their combined award of \$39,000.00 realized through this consolidated civil action in which they substantially prevailed. Upon Reversal and Remand of the lower court's legal errors, the Appellants that frivolously opposed the subject post-judgment motion shall also be responsible for the increased attorney's fees and costs through the entire prosecution of the consolidated civil rights action. See, Syllabus point 2, Orndorff v. West Virginia Dep't of Health, 165 W.Va. 1, 267 S.E.2d 430 (1980) (cited in Heldreth v. Rahimian, 219 W.Va. 462, 637 S.E.2d 359, 370 (2006)).

Assignments of Error

1. The lower court erred as a matter of law when it denied the recovery of any costs. "The language of Rule 68(a) is plain. An offer of judgment must include costs." Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 175, 597 S.E.2d 302, 308 (2004). The Court in *Shafer* further stated that "if the offer does not state that costs are included and an amount for costs is not specified, the trial court will be obliged by the terms of the rule to include in its judgment an additional amount which, in its discretion, it determines to be sufficient to cover the costs". Id.

2. The lower court further erred as a matter of law when it failed to apply contract principles to Rule 68 Offers of Judgment. See, Meadows v. Wal-Mart Stores,

Inc., 207, W.Va. 203, 220, 530 S.E.2d 676, 693 (1999). By failing to follow West Virginia law and correctly apply our contract law to the subject Offers, the court did not interpret the Offers against the Defendants that drafted it, but rather allowed the Defendants to benefit from broad general language to shield them from legal liabilities that must be specifically disclaimed. “The recovery of reasonable attorney’s fees must be explicitly waived by the parties to bar the court from awarding such fees in those types of cases where reasonable attorney’s fees are otherwise recoverable.” Jordan v. National Grange Mutual Insurance Co., 183 W.Va. 9, 13 n. 3, 393 S.E.2d 647, 651 n. 4 (1990). The lower court further erred by distinguishing the respective acceptance of the offers as “unconditional” when West Virginia law states that any acceptance of an offer under the Rule is a rejection of such an offer if it is not accepted unconditionally, in accordance with basic tenets of contract law. The subject offers were made pursuant to Rule 68(a), *not* Rule 68(b). Rule 68(a)(b) and (c) of the West Virginia Rules of Civil Procedure.

3. The lower court erred as a matter of law by refusing to acknowledge the black letter law of this Court’s previous ruling that attorney’s fees are “costs” under the West Virginia Human Rights Act. Syllabus Point 5, Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004).

Standard of Review

The Circuit Court’s failure to award any costs to the Plaintiffs was a legal error. The subject Rule 68(a) Offers of Judgment do not even contain the term “costs” in connection to the costs of the Plaintiffs, let alone do the Offers make any allowance for costs as necessitated by the Rule. The only reference to “costs” in the four corners of that

document concerns only the Defendants' intention to seek costs against the Plaintiffs. The Circuit Court's refusal to acknowledge that attorney's fees are defined as a "cost", not a "claim", by the West Virginia Human Rights Act, as construed by this Court, was a legal error. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004) (quoting Syllabus point 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995), Syllabus point 1, State v. Paynter, 206 W.Va. 521, 526 S.E.2d 43 (1999)) (internal quotations omitted). "An interpretation of the West Virginia Rules of Procedure presents a question of law subject to a *de novo* review." Syllabus point 2, Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004) (quoting Syllabus point 4, Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (1997) (internal quotations omitted)).

Given the practice of evaluating Rule 68(a) Offers of Judgment with the application of contract law, the subject offers must be evaluated with those principles in mind. Because the interpretation of the meaning of a contract's terms is a question of law, such an interpretation by the lower court is reviewed *de novo*. Fraternal Order of Police Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 100, 468 S.E.2d 712, 715 (1996).

Argument

The Appellants have been denied their actual costs, denied their attorney's fees, and denied their attorney's fees as defined as costs under West Virginia law. The Circuit

Court inexplicably failed to award costs where it was required to do so under the Rule. The Circuit Court denied these Plaintiffs their attorney's fees when it ignored the legal requirement that any such waiver of attorney's fees be *explicitly* waived or that an Offer of Judgment *explicitly* recite that attorney's fees are included as a certain figure or as part of a lump sum offer. Instead, the lower court allowed legally insufficient, broad general language to cap the Defendants' liability and as a result mislabeled "costs", including attorney's fees, as "claims". The wording of the accepted Offers of Judgment, Rule 68(a), and the West Virginia Human Rights Act as interpreted in *Shafer* mandate that this consolidated civil action be Remanded with instructions for the Circuit Court to award the Plaintiffs their costs through appeal, including the "cost" of their reasonable attorney's fees.

A. The Circuit Court Failed to Award Costs in Addition to the Lump Sum Figure in the Offer, Despite that Said Offer was Silent as to the Plaintiffs' Costs then Accrued at the Time of the Offer.

Rule 68(a) of the West Virginia Rules of Civil Procedure provides that the "adverse party", or the Plaintiffs in this instance, may accept the money judgment offered, "with costs then accrued", if the Offer of Judgment is accepted within 10 days of service of such offer. *See*, W. Va. R. Civ. Pro. 68(a). None of the Offers of Judgment spoke to attorney's fees or costs. It most certainly did not mention that "costs then accrued" were included in the \$13,000.00 sum offered. The lower court had before it the original Notices of Acceptance and original Offers of Judgment, the language of those pleadings also being read into the record during the subject hearing. The lower court erred as a matter of law in denying the Petitioners' Motion for Attorney's Fees and Costs

brought under Rule 68 (a) as construed by Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004).

Because the Offers are silent as to costs, the Plaintiffs are each entitled to an award of costs by the Court in addition to the money judgment offered for their claims. Under the Rule, costs must be included with the offer. Whether or not such costs are separately included in the wording of the offer is up to the drafter. See, Shafer, at 173, 306 (quoting *Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure, § 68(a), p. 1046* (2002)). In that case directly analogous with this one, our State's Supreme Court continued to quote from the First Edition of the Litigation Handbook:

If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs: if the offer does not state that costs are included and an amount for costs is not specified, the trial court will be obliged by the terms of the rule to include in its judgment an additional amount which, in its discretion, it determines to be sufficient to cover the costs. In either case, however, the offer has allowed judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs.

Shafer, at 175, 308. The commentators have not wavered from their position regarding the correct interpretation of this aspect of the application of Rule 68. See generally, *Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, Second Edition, § 68(a), p. 1399* (2006).

The subject Offers did not recite that costs were included, nor did the Offers specify an amount for costs. No reading of the subject verbiage could construe that the Offers addressed the Plaintiffs' costs. Therefore, the Circuit Court failed to fulfill its obligations under the Rule to compensate the consolidated Plaintiffs for their costs when it denied their motion. Quixotically, during the subject Hearing on October 26, 2006, the

defense attorney employed as personal counsel for Mr. Radevski and counsel for the Defendant corporation, conceded that the consolidated Plaintiffs would “certainly” be entitled to “court costs” by “simply being the prevailing party, like in any litigation” and invited the Court to entertain a request for “filing fees and things of that nature”. However, in his next breath, he went on to insist that attorney’s fees were a “claim” as opposed to a cost, ignoring Syllabus point 5 of *Shafer*. *Transcript* at p. 18, lines 1-10.

B. Attorneys Fees under a Rule 68(a) Offer of Judgment Must be Explicitly Waived by the Parties or Such Fees Will be Awarded by the Court Where Attorney’s Fees are Otherwise Recoverable.

The duly served Rule 68(a) Offers of Judgment served upon the Plaintiffs through Counsel contain absolutely no mention of Attorney’s Fees. Neither the term “attorney’s fees” nor any conceivable derivation of the term appears within the document. Given those undeniable facts, it is therefore a legal impossibility for any jurist to conclude that there has been a waiver of the Plaintiffs’ attorney’s fees, much less an *explicit* waiver of such a cost.

The Supreme Court of Appeals of West Virginia has already addressed this particular matter at issue, which is factually identical to the Offer in the *Shafer* case, in a lengthy footnote:

We wish to make clear that nothing in this opinion precludes defendants from making lump sum offers that explicitly include costs *and* attorney’s fees. . . . Such lump sum offers of judgment, however, must be *explicit* in stating that the offer is inclusive of attorney’s fees if that is the defendant’s intent in making the offer of judgment. Although it is not an implausible reading of Rule 68 to say that the explicit inclusion of costs includes attorney’s fees where costs themselves include fees, this is not the position the federal courts have taken. Rather, as we identified in *Meadows*, courts apply contract principles to offers of judgment, . . . , and in so doing ‘courts

tend to interpret Rule 68 offers against the defendants who drafted them[.]’ . . . Consequently, unless the offer explicitly includes attorney’s fees, the courts construe the offer to be silent as to attorney’s fees if fees are not explicitly included, thereby necessitating an attorney’s fee award beyond the sum included in the offer. . . . Based on a similar reasoning, one leading federal treatise has explained, ‘[a]s a consequence, even defendants who honestly believe that they have capped their total liability may find that they are required to pay plaintiff’s attorneys fees in addition to the sum in the Rule 68 offer because their offers did not explicitly provide otherwise.’ . . .

FN8, Shafer, at 176, 309 (emphasis in the original) (internal citations omitted).

Broad general language is no substitute for the annunciated legal requirements put in place by our Court. The importance of this vanguard harkens back to the very reasons why fee-shifting provisions were built into federal and state civil rights legislation in the first place. As this Honorable Court quoted in *Shafer*:

The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. Full enforcement of the civil rights act requires adequate fee awards.

Bishop Coal Co. v. Salyers, 181 W.Va. 71, 80, 380 S.E.2d 238, 247 (1989).

If Erie Insurance Property & Casualty Company, Inc. and the Defendants intended to include attorney’s fees and costs in the subject Offers of Judgment, then quite simply, the drafters should have done so *explicitly*, as required by law.

C. Attorney’s Fees in This Consolidated Civil Action Brought Pursuant to the West Virginia Human Rights Act Are Defined as Costs, Not Claims, and Must be Awarded Under Rule 68(a) and the Law Announced in *Shafer v. Kings Tire Services, Inc.*

The lower court was laboring under the misconception that attorney’s fees are not included as costs whenever it is asked to construe a Rule 68 Offer of Judgment. The

court relied upon language in the per curiam decision of Kincaid v. Morgan, 188 W.Va. 452, 425 S.E.2d 128 (1992) that cited to law supporting the *general* premise that costs typically do not include attorney's fees. It then inexplicably ignored the law directly on point recently announced in *Shafer* in 2004, though it was quoted extensively in the Consolidated Plaintiffs' Motion for Attorney's Fees and Costs and the clear distinction was zealously argued during the subject hearing on the motion. *Transcript* at p. 10, lines 14-25 and p. 11, lines 1-19.

This High Court must now correct this legal error and instruct the Circuit Court to apply its law as previously handed down in *Shafer*. "Costs included under West Virginia Rule of Civil Procedure 68(a) include attorney's fees when any statute applicable to the case defines costs as including attorney's fees." Syllabus Point 4, *in part*, Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004)(*Davis, J.*). The Plaintiffs were proceeding under the West Virginia Human Rights Act for gender-based discrimination brought about through opposite sex sexual harassment. *See*, West Virginia Code § 5-11-1, *et seq.* The Human Rights Act includes a fee shifting provision for prevailing claimants. W.Va. Code § 5-11-13(c). "Because the Human Rights Act defines costs as including attorneys fees, the costs included in a Rule 68 offer of judgment includes attorney's fees." Syl. Pt. 5, Shafer.

The Appellees advocate for the misnomer that a request for attorney's fees and costs is a "claim", and that because "all claims" were released by the Acceptances of the Offers of Judgment, the Appellants are not permitted to recover attorney's fees and costs. They argue that because attorney's fees and costs requests appear in the *ad damnum* clauses of the respective well-pleaded Complaints, they are somehow imbued with the

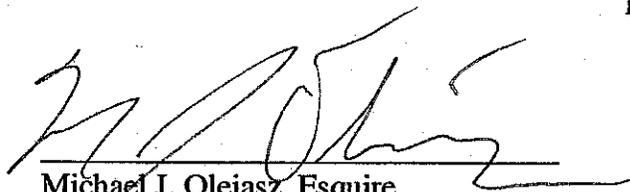
legal distinction of being “claims”. The Court should not allow lawyers to banter about and confuse lay terminology with legal terms of art. The Defendants were not sued for attorney’s fees and costs. The Defendants were sued for specific causes of action recognized under West Virginia law, delineated as separate Counts in the well-pleaded Complaints as Violation of the West Virginia Human Rights Act, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Battery, and Negligence. The Appellants substantially prevailed on their “claims”: causes of action with readily identifiable elements that must be proven to a trier of fact. Attorney’s fees and costs are not argued to a jury in a plaintiff’s case-in-chief, such recoveries are awarded by the Court after a party substantially prevails, if the law allows. “In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.” West Virginia Code § 5-11-13(c).

Conclusion

The Circuit Court failed to apply the law on point. The Defendants and Erie Insurance Property & Casualty Company, Inc., resisted the Consolidated Plaintiffs’ Motion for Attorney’s Fees and Costs in bad faith, with no factual or legal grounds. Upon reversal of the lower court’s legally incorrect denial of costs, including reasonable attorney’s fees and costs, the Appellees will be liable to the Appellants for increased costs, including attorney’s fees and costs after appeal and in accordance with Syllabus Point 2, Orndorff v. West Virginia Dep’t of Health, 165 W.Va. 1, 267 S.E.2d 430 (1980) (*cited recently in* Heldreth v. Rahimian, 219 W.Va. 462, 637 S.E.2d 359, 370 (2006)).

WHEREFORE, the Appellants pray for the Supreme Court of Appeals of West Virginia to REVERSE the lower court's denial of costs, including reasonable attorney's fees and costs, and REMAND the case to the lower court with direction to conduct a hearing to determine an award for the Consolidated Plaintiffs' costs, including reasonable attorney's fees and costs.

ROBIN L. CROFT, JILL A. ARMITAGE,
AND BRANDY G. MCCOY, Appellants,
By Counsel



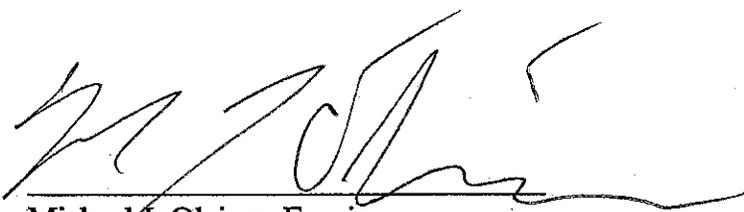
Michael J. Olejasz, Esquire
WV ID #9273
FERRO & OLEJASZ
1144 Market Street, Suite 202
Wheeling, WV 26003
(304) 233-6000
(304) 233-1643 fax

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing "APPELLANTS' BRIEF IN SUPPORT OF APPEAL" was had upon the following by sending true and accurate copies thereof via first class U.S. Mail, postage prepaid, on October 16, 2007 to the addresses listed below:

Melanie M. Norris, Esquire
STEPTOE & JOHNSON, PLLC
1233 Main Street, Suite 3000
Wheeling, WV 26003

P. Joseph Craycraft, Esq.
DICKIE McCAMEY & CHILCOTE, L.C.
1233 Main Street, Suite 2002
Wheeling, WV 26003



Michael J. Olejasz, Esquire
WV ID #9273
FERRO & OLEJASZ
1144 Market Street, Suite 202
Wheeling, WV 26003
(304) 233-6000
(304) 233-1643 fax