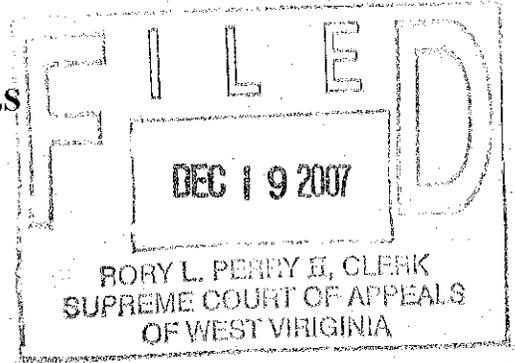


IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA
NO. _____



Marshall County Civil Action No. 03-C-56K
(The Honorable Mark A. Karl, Judge)

TINA CLARK,

Petitioner and Plaintiff below,

v.

THE HONORABLE MARK A. KARL, JUDGE
OF THE CIRCUIT COURT OF MARSHALL
COUNTY, WEST VIRGINIA, 2nd JUDICIAL
DISTRICT,

Respondent.

**VALLEY NATIONAL GASES, INC.'S (DEFENDANT BELOW) RESPONSE
TO PETITION FOR WRIT OF MANDAMUS**

Counsel for Valley National Gases, Inc. (Defendant below):

William A. Kolibash, Esq.
(WV Bar I.D. No. 2087)
Richard N. Beaver, Esq.
(WV Bar I.D. No. 6864)
Phillips, Gardill, Kaiser & Altmeyer, PLLC
61-14th Street
Wheeling, WV 26003

TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF THE RULINGS BELOW ...2

II. STATEMENT OF THE CASE.....3

III. REPLY TO ASSIGNMENT OF ERROR.....7

IV. STANDARD OF REVIEW.....7

V. TABLE OF AUTHORITIES.....8

VI. DISCUSSION OF THE LAW.....9

 A. Petitioner’s Right to Have Her Suit Adjudicated Has Not Been Denied.....9

 B. Respondent The Honorable Mark A. Karl Has Not Unnecessarily Breached Any Duty Owed to Petitioner.....11

 1. The Continuances of the Trial of This Matter Were Reasonable, Necessary and Done According to Law.....11

 2. The Unnecessary Costs Petitioner Asserts Are Irrelevant to Her Request for a Writ of Mandamus and Are Shared By Valley.....14

 C. Petitioner Has Remedies Exclusive of an Extraordinary Writ of Mandamus; Namely, Securing a Trial Date in the Circuit Court of Marshall County.....15

VII. RELIEF REQUESTED.....16

CERTIFICATE OF SERVICE.....18

I.

**KIND OF PROCEEDING
AND NATURE OF THE RULINGS BELOW**

Valley National Gases, Inc.'s (hereinafter "Valley") is not a named Respondent in Petitioner Tina Clark's Petition for Writ of Mandamus. However, Valley offers its Response herein pursuant to the request of the Supreme Court of Appeals of West Virginia.

Petitioner's employment with Valley was terminated due to excessive absenteeism. She filed this case alleging wrongful termination based primarily on workers' compensation retaliation. This instant Petition for Writ of Mandamus results from the trial of this matter being continued on six occasions. However, every continuance was appropriate, based upon law and for good cause.

In five of the six times that this case was continued, the Court followed established law in resolving scheduling conflicts. The only time that the Court used its discretion to continue this trial was for good cause when the Court was advised that Valley's corporate representative and primary witness was scheduled to undergo hip replacement surgery.

Rather than work with defense counsel and the Trial Court to schedule a new trial date, Petitioner filed a Motion for Transfer. At the hearing on the Motion to Transfer, the Court expressed concerns that there was no legal basis for the transfer. Understandably, no new trial date has been scheduled while the Motion to Transfer is pending.

II.

STATEMENT OF THE CASE

Petitioner, Tina Clark, was terminated for excessive absenteeism. The Valley employee handbook states that "excessive absenteeism and tardiness may subject an employee to discipline up to and including termination." A review of Petitioner's employment history with Valley proves Valley's stated reasons for her termination.

Petitioner first began working for Valley as a temporary receptionist at its Wheeling, West Virginia facility through a temporary agency on or about April 4, 2000. She became a full-time Valley employee on November 1, 2000, and worked as a billing clerk.

Just over six months after beginning full-time employment with Valley, on or about May 25, 2001, Petitioner was counseled for calling off work at a greater rate than was considered acceptable by Valley. Petitioner was informed, on March 25, 2001, by a notation on her timecard, that "taking more than 2 days off for sick in a 1 year period is considered excessive."

On or about October 11, 2001, Petitioner was issued a formal warning for excessive absenteeism and advised at that time that continued excessive absenteeism and tardiness could result in discipline, up to and including discharge. As discipline for her poor attendance, Petitioner was placed on another 90-day probationary period, and signed an acknowledgement of the same. Petitioner understood that "her [poor] attendance at work was deemed by Valley to be unacceptable."

On December 18, 2001, following numerous additional absences, Valley met with Petitioner and stressed the importance of being at work everyday. Ms. Miller explained

the hardship created among Petitioner's co-workers when she was absent from work. On December 28, 2001, Petitioner was laid off due to a reduction in force.

Petitioner was recalled to the position of accounts receivable clerk pursuant to Valley's recall policy on April 5, 2002. Before Petitioner resumed her employment, Petitioner's two supervisors met with her and discussed her earlier demonstrated problems with excessive absenteeism, stressed that they were short-handed in help and counted on Petitioner's regular work attendance. They advised Petitioner that they expected her work attendance to improve. Petitioner promised that her attendance would not be a problem.

Nevertheless, Petitioner did not meet Valley's attendance expectations and her excessive absenteeism continued over the next several months preceding her termination. On or about on July 5, 2002, her two supervisors scheduled a meeting with Petitioner to communicate her 90-day evaluation after starting her new job, but due to Petitioner's additional absence, the meeting did not take place until July 22, 2002. At that time, Petitioner received, and signed acknowledgement to, another written warning for excessive absenteeism in conjunction with the 90-day evaluation, thereby highlighting the continuing problem.

Once again, Petitioner failed to improve her attendance. As a result, Valley's HR Director prepared talking points for Petitioner's two supervisors for a meeting with Petitioner regarding a final written warning on her attendance. Valley's HR Director made the decision not to follow the third step of Valley's disciplinary procedure, suspension, as he felt it was not appropriate to give more time off to an employee who had an attendance problem.

Once again, Petitioner's attendance did not improve. In fact, in the nine work days preceding her termination, Petitioner was absent all nine days. None of these nine days of absence related to her arm injury which is the subject of this lawsuit. Of 103 available workdays between her recall in April and discharge in August, Petitioner missed a total of 23 days or 22% of them. Of the 23 missed days, Petitioner used two sick days, 10 vacation days and 11 days "off without pay." Nine of the 11 days "off without pay" purportedly were attributable to sinusitis and one was a result of Petitioner taking the day off because her boyfriend was in the hospital because of a bee sting. Only one day allegedly was due to her arm injury.

Petitioner called one of her supervisors on August 25, 2002, to state she would be returning to work on August 26, 2002. Petitioner did not return on August 26, 2002, or the several days thereafter. However, Petitioner assured her two supervisors that she would return to work on August 29, 2002. Again, she did not show for work, nor did she call to report off. As a result, her two supervisors telephoned Petitioner and terminated her employment.

Petitioner did not file a claim for Worker's Compensation benefits until after her termination, on or about September 3, 2002. This was the first time that she alleged that her arm injury was work-related. On the contrary, Valley first was notified that Petitioner was having a problem with her right arm on or about June 29, 2002, when Petitioner complained to one of her supervisors that she injured her arm while walking her dog. On or about July 1, 2002, Petitioner came to work with her arm in a sling and a wrap. She worked the entire day and did not indicate to her supervisor that her arm was causing her trouble or that she needed assistance. Petitioner's medical records related to her first

treatment for her arm indicate that she did not know why her arm hurt.

Despite her employment history, Petitioner filed a wrongful termination claim on or about March 3, 2003. She has amended her complaint twice. Petitioner chose Marshall County as the venue for her action despite the fact that venue is appropriate in Ohio County because that is the location of her employment with Valley and the location from which she was terminated.

Both Petitioner and Valley are frustrated that this case has been continued on six separate occasions. However, each of the continuances was for good cause. Five of the six times that this case was continued, the Court followed established law in resolving scheduling conflicts. The only time that the Court used its discretion to continue this trial was for good cause when the Court was advised that Valley's corporate representative and primary witness, Deborah Gordley, was scheduled to undergo hip replacement surgery. Although Petitioner characterizes the surgery as merely "elective" and has accused Ms. Gordley of scheduling the same to coincide with the trial, such is not the case. Ms. Gordley's hip was in such deteriorated shape that she could barely walk and was in constant pain. Rescheduling her surgery would place it months down the surgery calendar and would surely result in further deterioration of her hip. As the Court is aware, patients do not control the hospital surgical calendar. Ms. Gordley's so called "elective" surgery was necessary and unavoidable.

The most recent continuance was due to a conflict with a criminal trial. The Court provided alternative dates of the week of Thanksgiving 2007 or March 24, 2008 as alternative dates. Defense counsel had a scheduling conflict with both dates due to other previously scheduled trials. Rather work with Defense counsels' and the Trial Court's

schedules to obtain a new trial date, Petitioner's counsel filed a Motion to Transfer. At the hearing on the Motion to Transfer, the Court expressed concerns that there was no legal basis for the transfer. No new proposed trial dates were offered due to the pending Motion to Transfer.

III.

REPLY TO ASSIGNMENT OF ERROR

FIVE OF THE SIX CONTINUANCES OF THE TRIAL DATES IN THIS MATTER WERE APPROPRIATE PURSUANT TO RULE 5.02 WVTCR CONCERNING TRIAL SCHEDULING CONFLICTS AND THE REMAINING CONTINUANCE WAS FOR GOOD CAUSE SHOWN BY VALLEY; ACCORDINGLY, RESPONDENT, THE HONORABLE MARK A. KARL, ACTED APPROPRIATELY AND WITHIN THE BOUNDS OF THE LAW ON EACH OCCASION.

IV.

STANDARD OF REVIEW

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 adequate remedy. Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969); *Arneault v. Arneault*, 216 W.Va. 215, 217, 605 S.E.2d 590, 592 (2004). The burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking the relief and a failure to meet any one of them is fatal. *State ex rel. Richey v. Hill*, 216 W.Va. 155, 160, 603 S.E.2d 177, 182 (2004).

Because mandamus enforces only an established right, “[p]etitioners in mandamus must have a clear legal right to the relief sought therein and such right cannot be established in the proceeding itself.” Syl. pt. 1, *State ex rel. Kucera v. Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case if it unreasonably neglects or refuses to do so. *State ex rel. Rahman v. Canady*, 205 W.Va. 84, 86, 516 S.E.2d 488, 490 (1999).

V.

TABLE OF AUTHORITIES

Cases

Arneault v. Arneault, 216 W.Va. 215, 605 S.E.2d 590 (2004).

State ex rel. Kucera v. Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).

State ex rel. Rahman v. Canady, 205 W.Va. 84, 86, 516 S.E.2d 488, 490 (1999).

State ex rel. Richey v. Hill, 216 W.Va. 155, 603 S.E.2d 177 (2004).

State ex rel. Riffle v. Ranson, 464 S.E.2d 763, 195 W.Va. 121 (1995).

Statutes

W. Va. Code, § 56-1-1.

W. Va. Code § 56-9-1.

Rules

Rule 5.02, WVTCR.

VI.

DISCUSSION OF THE LAW

Petitioner's request for a Writ of Mandamus against Respondent The Honorable Mark A. Karl should be denied because she cannot meet any of the three required elements. First, Petitioner cannot show that her right to a trial has been denied. Petitioner has been given trial dates. Second, Respondent has not breached any duty owed to Petitioner. Respondent has fulfilled his duty to Petitioner by giving her trial dates. Respondent's appropriate and lawful conduct in granting continuances of trial dates are not breaches of any duty nor is said conduct an indication that the Respondent unreasonably neglected to schedule the trial in this matter or refused to do so. Third, Petitioner has a remedy other than a Writ of Mandamus - she can work with Defense counsel and the Court to obtain mutually convenient dates for the trial. Thus, her Petition for a Writ of Mandamus must be denied.

A. Petitioner's Right to Have Her Suit Adjudicated Has Not Been Denied.

Petitioner's right to have her lawsuit proceed to trial has never been denied. Petitioner has not and cannot point to any Order of the Circuit Court of Marshall County that denies her the right to a jury trial. Rather, Petitioner is frustrated, as is Valley, by the inability to keep a trial date. However, the inability to keep a trial date is the result of unfortunate circumstances, not the Respondent The Honorable Mark A. Karl's refusal to give Petitioner her day in Court.

It should be noted that Petitioner chose venue in Marshall County although the venue of this case appropriately lies in Ohio County. The West Virginia venue statute provides, in pertinent part:

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is; W. Va. Code, § 56-1-1

Valley's place of business is located in Ohio County. Petitioner worked in the Ohio County office. Ohio County is the location from which Petitioner's employment was terminated. Rather than file in the venue where her employer is located and from where she was terminated, Petitioner participated in forum shopping.

When choosing Marshall County as a venue, Petitioner's counsel was aware that two Circuit Judges share the same court room and that the county has an active civil and criminal docket. Petitioner's counsel also knew that the same two Judges cover Wetzel and Tyler County civil and criminal dockets. Petitioner's counsel was aware that continuances in Marshall County occur as a result of the above situations.

At the same time, Petitioner's counsel also knew that Ohio County has twice as many judges as Marshall County and twice as many court rooms. Petitioner's choice of venue has contributed to the delay of the trial of this matter. The busy dockets of the two judges sharing one court room in Marshall County as well as busy dockets in two other counties have resulted in the inability to try this case. However, the Trial Court has not refused to try the case. Because Petitioner has not been denied the right to try her case, she has not met the first requirement for a Writ of Mandamus to be issued and her Petition should be denied.

B. Respondent The Honorable Mark A. Karl Has Not Unnecessarily Breached Any Duty Owed to Petitioner.

Petitioner advances two arguments to meet her burden of proving that Respondent breached a duty owed to her related to the trial of this action. First, she erroneously asserts that the Respondent unnecessarily failed to try this case. Second, she explains unnecessary costs that she has faced due to the continuances, which is not an element of proof in seeking a writ of mandamus. Each issue is discussed below.

1. The Continuances of the Trial of This Matter Were Reasonable, Necessary and Done According to Law.

Petitioner cites codes of judicial conduct relating to avoiding unreasonable delay and the expeditious determination of matters before the court to support her contention that the Trial Court breached a duty owed to her. Plaintiff identifies the six instances in which this case has been continued and the instance when the trial date was vacated due to the removal of this action to federal court to support her claim of unreasonable delay. However, a closer look into the facts related to the continuances shows that the delays in the trying of this case were proper and unavoidable.

The first instance that the trial date was vacated resulted from Valley removing this case to Federal Court because Petitioner raised Family Medical Leave Act violations. As soon as the case was removed to Federal Court, the State Court was precluded by federal law from taking further action on the case. After the case was remanded to the Circuit Court of Marshall County, a new trial date was set.

In five of the six times that this case was continued, the Court was following established law in resolving scheduling conflicts. West Virginia Trial Court Rule 5.02 requires the Court to first try criminal felony cases over civil cases and then requires that

civil cases placed first on the docket be tried first. The Respondent The Honorable Mark A. Karl acted appropriately in continuing the trial pursuant to the trial court rules.

On one of the above cited five occasions when this case was continued, November 27, 2006, Petitioner's case was behind a criminal trial and second on the civil docket because Petitioner chose to be placed second on the docket rather than secure a later trial date and be first on the docket.

The only time that this Court used its discretion, rather than Rule 5.02 WVTCR, to continue this trial was for good cause. The Court was advised that Valley's corporate representative and primary witness, Deborah Gordley, was scheduled to undergo hip replacement surgery. Petitioner's characterizes the surgery as merely "elective" and has accused Ms. Gordley of scheduling the same to coincide with the trial. However, such is not the case.

As the Court is aware, patients do not control the hospital surgical calendar. Moreover, Ms. Gordley's hip was in such deteriorated shape that she could barely walk and was in constant pain. Rescheduling her surgery would place it months down the surgery calendar and would surely result in further deterioration of her hip. Ms. Gordley's so called "elective" surgery was necessary and unavoidable. Accordingly, the Court's use of its discretion to grant Valley's Motion to Continue was not only correct, but humane.

After the most recent continuance, the Respondent provided the week of Thanksgiving, 2007 and March 24, 2007 as alternative dates to try this case. Both dates conflicted with previously scheduled trials by Valley's counsel. Rather, than work with the Trial Court's and Valley's counsel's schedules to obtain the earliest trial date,

Petitioner filed a Motion for Transfer although there was no legal basis for the same, thereby further delaying the trial of this case.

In that regard, the West Virginia Removal statute provides:

A circuit court, or any court of limited jurisdiction established pursuant to the provisions of section 1, article VIII of the Constitution of this State, wherein an action, suit, motion or other civil proceeding is pending, or the judge thereof in vacation, may on the motion of any party, after ten days' notice to the adverse party or his attorney, and *for good cause shown*, order such action, suit, motion or other civil proceeding to be removed, if pending in a circuit court, to any other circuit court, and if pending in any court of limited jurisdiction hereinbefore mentioned to the circuit court of that county: Provided, that the judge of such other circuit court in a case of removal from one circuit to another may decline to hear said cause, if, in his opinion, the demands and requirements of his office render it improper or inconvenient for him to do so. W. Va. Code § 56-9-1 (Emphasis added).

Good cause for removal, for purposes of statute dealing with removal of causes generally, applies to situations where the judge is disqualified, where uninterested and unbiased jury cannot be found in circuit where suit was originally filed, or where clerk of court is party litigant. *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763, 195 W.Va. 121 (1995). Transfers are not automatic under statute dealing with removal of causes generally. *Id.* Petitioner did not and can not meet one of the general situations contemplated by the removal statute to support her motion and the Trial Court advised her counsel of the same at the hearing on her motion.

It is clear that Petitioner has failed to meet her burden to show that the Respondent The Honorable Mark A. Karl failed in meeting any duty owed to her. Both parties are disappointed that this case has been continued in accordance to the Trial Court Rules, federal law and the necessary surgery of Valley's representative; however, the disappointment is insufficient cause to meet Petitioner's burden of showing that

Respondent breached a duty owed to her. Accordingly, Petitioner cannot meet the second requirement for a Writ of Mandamus and her Petition should be denied.

2. The Unnecessary Costs Petitioner Asserts Are Irrelevant to Her Request for a Writ of Mandamus and Are Shared By Valley.

Petitioner complains of several unnecessary costs incurred by her as a result of the continuances in the trial of this matter. None of the alleged costs are part of this Honorable Court's considerations in deciding whether to grant the extraordinary remedy requested by Petitioner. Nevertheless, Valley will respond so that this Honorable Court has a full understanding of the issues.

First, Petitioner mischaracterizes the destruction of Valley's computers. The event occurred after the original discovery deadline expired early in the case. Valley was merely rotating old computers out of service. Valley's representative testified that all evidence on the computers was retained and Petitioner was provided with the same. A sledgehammer was simply Valley's standard, cost effective manner chosen to destroy proprietary and confidential information on all computers that were rotated out of service.

Second, Petitioner has not and cannot identify one witness previously employed by Valley from whom she has been unable to obtain trial testimony. Petitioner identifies Dan Bauer as a witness who is no longer in this jurisdiction that has caused additional expense in securing his testimony, but she fails to tell this Honorable Court that she cancelled his videotaped trial testimony on two occasions. Additionally, Petitioner's deceased father was not identified as a witness in Petitioner's witness disclosure contained in her Pretrial Memorandum. Thus, Petitioner has lost no witnesses.

Third, Petitioner complains of having to present trial testimony by video tape

deposition and enduring the stress and expense of preparing for trial on more than one occasion. Both parties have been required to provide witness testimony via videotape evidentiary deposition and endure the stress and expense of preparing for trial on several occasions. Valley, likewise, has had to delay putting this matter behind it and moving on.

Petitioner also complains of unnecessary costs incurred by her as a result of the continuances in the trial of this matter. Valley has likewise incurred additional costs. However, additional costs are not part of this Honorable Court's considerations in deciding whether to grant the extraordinary remedy requested by Petitioner.

Accordingly, Petitioner cannot meet the second requirement for a Writ of Mandamus and her Petition should be denied.

C. Petitioner Has Remedies Exclusive of an Extraordinary Writ of Mandamus; Namely, Securing a Trial Date in the Circuit Court of Marshall County.

Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case *if it unreasonably neglects or refuses to do so*. *State ex rel. Rahman v. Canady*, 205 W.Va. 84, 86, 516 S.E.2d 488, 490 (1999)(Emphasis added).

As described in detail above in section B, there was nothing unreasonable about the continuances in this case. The Respondent was simply following established trial court rules related to five of the continuances, federal law in regard to one continuance and correctly used its sound discretion in continuing the trial due to a serious medical condition of Valley's representative. Likewise, there has been no indication that the

Respondent has refused to try this case and the facts as described herein support the same.

On the contrary, Petitioner has another remedy. Her remedy is to cooperate with defense counsel and the Court to secure a mutually agreeable trial date, preferably as the first trial on the docket on the court. Transferring this case to the other judge in the Second Judicial Circuit will not alleviate the problems inherent in the congested docket or single court room. Transferring this case to another overworked judge with a full docket will not guarantee a speedier trial either. Petitioner's case will not be scheduled until the earliest date on the new court's trial docket. Petitioner has failed to meet her burden to prove the third requirement for the issuance of a Writ of Mandamus. Thus, her Petition must be denied.

VII.

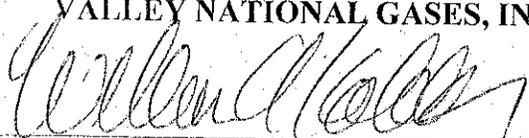
RELIEF REQUESTED

Wherefore, Valley (Defendant below) prays that this Honorable Court deny the Petitioner's Petition for Writ of Mandamus.

Respectfully submitted

VALLEY NATIONAL GASES, INC.,

By



Of Counsel for Defendant below Valley
National Gases, Inc.

William A. Kolibash, Esq.
(WV Bar I.D. No. 2087)

Richard N. Beaver, Esq.
(WV Bar I.D. # 6864)

Phillips, Gardill, Kaiser & Altmeyer, PLLC
61-14th Street

Wheeling, WV 26003
Phone: (304) 232-6810
Facsimile: (304) 232-4918

CERTIFICATE OF SERVICE

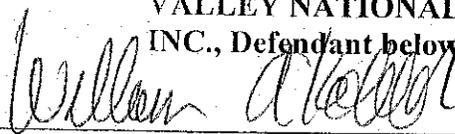
Service of the foregoing **RESPONSE TO PETITION FOR WRIT OF MANDAMUS** was made upon the other parties to this action by mailing a true copy thereof by United States mail, postage pre-paid, to their attorneys, this 15th day of December, 2007, addressed as follows:

Frank X. Duff, Esq.
Sandra K. Law, Esq.
Schrader, Byrd & Companion, PLLC
The Maxwell Centre, Suite 500
32-20th Street
Wheeling, WV 26003
Counsel for Plaintiff

The Honorable Mark A. Karl, Judge
Circuit Court of Marshall County
C/O Jeffrey D. Cramer, Esq.
Marshall County Prosecuting Attorney
Marshall County Court House
Seventh Street
Moundsville WV 26041

**VALLEY NATIONAL GASES,
INC., Defendant below,**

By



Of Counsel

William A. Kolibash, Esq.
(WV Bar I.D. No. 2087)
Richard N. Beaver, Esq.
(WV Bar I.D. # 6864)
Phillips, Gardill, Kaiser & Altmeyer, PLLC
61-14th Street
Wheeling, WV 26003
Phone: (304) 232-6810
Facsimile: (304) 232-4918