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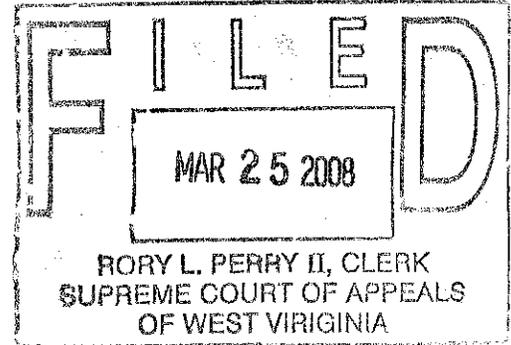
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

THOMAS STURM,
Petitioner,

vs.

KANAWHA COUNTY BOARD OF
EDUCATION,
Respondent.



FROM THE CIRCUIT COURT
OF KANAWHA COUNTY

APPELLANT'S BRIEF

Michael T. Clifford (#750)
723 Kanawha Boulevard East
Union Building, Suite 300
Charleston, WV 25301
304-720-7660
304-720-7753 (fax)

Barbara Harmon Schamberger (#7296)
P.O. Box 456
Clay, WV 25043

Counsel for Appellant

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BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE and the ASSOCIATE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA :

I. KIND OF PROCEEDING BELOW

Your appellant, Thomas K. Sturm, Jr. (hereinafter "appellant," "Thomas" or "Mr. Sturm" is disabled, and was classified as a disabled student within the Kanawha County School System of West Virginia. While in school he participated in Special Education and graduated from said program in June of 2004. Upon graduation, it was discovered, contrary to representations of the Kanawha County School System as to Mr. Sturm's educational progress, that Mr. Sturm was functionally illiterate, was moderately limited in his ability to understand, remember, and carry out detailed instructions, to maintain attention and concentration for extended periods, to perform activities within a schedule, maintain regular attendance, respond appropriately to changes in work setting, and to be aware of normal hazards and take appropriate precautions, among other things. As a result thereof, Mr. Sturm, upon reaching the age of majority, filed for and was awarded Social Security benefits (SSI) for being unable to work in any field common to this area. Thereafter, a civil action was filed in Kanawha County Circuit Court. Mr. Sturm's civil action was removed by Defendant/Appellee, to Federal Court where his Federal Law Claims were dismissed without prejudice under a theory that the Federal claims did not provide for a suit for damages and that Mr. Sturm had failed to exhaust his administrative remedies. The Federal Court, however, left in tact the possibility of state law claims and the matter was remanded to the Court of the Honorable Tod J. Kaufman, Circuit Court Judge.

Without any discovery having been taken from either party, the Defendant then moved to dismiss

Appellant's civil action on the theory that appellant had failed to exhaust his administrative remedies and that such alleged failure was also dispositive as to appellant's state causes of action. As to Thomas' state law claim for negligence, had he been permitted discovery, would have been able to show that (a) he had attempted post-graduation remedies of the Kanawha County School System before proceeding to trial and that the same had been denied; (b) that he had attempted alternative assistance pursuant to the Vocational Rehabilitation Act of 1974 and as provided by law, and that said attempt was held against him by the Kanawha County School System or in the alternative, the Kanawha County School System erroneously believed their duty to Mr. Sturm was relieved by his seeking additional assistance; and (c) that based upon the response of the Kanawha County School System and the alternatives available to Thomas, any attempt to seek administrative remedies would have been futile. Notwithstanding the point that genuine issues of material fact existed, and notwithstanding the point that no discovery had been taken by either party, the trial court, on the 3rd day of April 2007 dismissed Appellant's claim with prejudice holding that the Plaintiff/Appellant had "not stated a claim upon which relief could be granted" because Plaintiff/Appellant had "fail[ed] to exhaust his administrative remedies." From that order, this appeal is taken.

II. STATEMENT OF FACTS

The Appellant, Thomas P. Sturm, (hereinafter the "Mr. Sturm", "Thomas" or "Petitioner") was born on the 15th day April 1986. Mr. Sturm entered the Defendant's schools system at Flinn Elementary School in Kanawha County, West Virginia as a student who is Other Health Impaired (hereinafter "OHI"). Appellant's IQ has been uniformly placed in the low average range of intellectual ability and a comparison of his scores indicates that he performed equally as well, or poorly, on verbal ability tasks and non-verbal ability tasks. Appellant has also been diagnosed with

and medically treated for Attention Deficit Hyperactive Disorder (hereinafter "ADHD"). Appellant was diagnosed in 1999 with a depressive disorder and was hospitalized in 1999 at Highland Hospital as a result of suicidal ideations.

Academically, Thomas entered Sissonville High School on a behavior contract that was written by his classroom teacher and this contract was in effect until January 20, 2003. Thomas had various Independent Education Plans (hereinafter "I.E.P." or "I.E.P.s"), most of which had the same goals and were carried over from one year to the next without change or re-evaluation based upon Thomas' academic needs, in direct violation of the West Virginia State Board of Education Policy Bulletin No. 2419 (hereinafter "2419"). Additionally, Thomas' IEP stated that a positive behavior plan was to be written and in place in all education settings, which also was never done, again, contrary to 2419 and the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et esq. (hereinafter "IDEA"). Petitioner's IEP stated that his case manager and regular educator would collaborate if his grades fell below C-. This occurred on several occasions but no reports were generated nor meetings held to discuss these grades as was mandated by the IEP, all omissions in direct violation of the IEP, Policy 2419 and IDEA.

As part of his IEP at Sissonville High School, Thomas subsequently attended Ben Franklin Career Center. He was expelled, December 17, 2002, for having a knife on school property carried in his boot. At some point a disability manifestation meeting was held. At such meetings the student's IEP team members are supposed to work with the parents, and student when possible, to determine if the actions of the student in violating a rule or policy are the result of a manifestation of the student's disability or not. After Thomas' expulsion was completed, Thomas was not permitted to return to Franklin Career Center, even though the Board knew or should have known that Thomas' academic

abilities were extremely limited and attendance at Ben Franklin Career Center was his only hope of being able to attain functional skill. Indeed, the Board, through a Board member John Luoni, actively participated in depriving Thomas of further participation in education programs at Franklin Career Center. Specifically, Mr. Luoni, while a member of the Board of Education, contrary to policies and procedures of 2419, interjected himself into one of Thomas' disability manifestation meetings, actively participated in the same and was extremely verbal in advocating Thomas' removal from Sissonville High School and the Ben Franklin program.

Importantly, regular educators, special educators and administrators must attend all IEP Manifestation meetings. No less than ten (10) days prior to such meeting, the parents or guardians of must be sent notice and an invitation to attend said meeting. In the case at bar, numerous meetings were held in which proper notice was not given and or proper and appropriate representatives were not present. For Thomas, this meant that his right to due process was repeatedly denied and delayed by the Board.

Thomas's last IEP, on October 30, 2003, noted that Thomas read at approximately a third grade educational level, that he had difficulty locating specific details in textbook passages, drawing conclusions, determining a sequence of events and locating information to promote understanding. By late Spring semester, the school record reflects that Thomas was failing academically, yet no action was taken by the IEP team, the school or other school personnel, despite the fact that his IEP was designed to have a 'fail safe' of a convocation of a meeting of the case manager and regular educator if his grades fell below a C-. This was never done. Instead, Thomas simply was graduated from the Kanawha County School System despite having failed to achieve even his modified academic IEP goals.

Thomas, just prior to graduation, on April 19th 2004, made application for Supplemental Security Income benefits through the Social Security Administration. On July 29 2005, he was awarded benefits, based in part, on the fact that the was functionally illiterate, was moderately limited in his ability to understand, remember, and carry out detailed instructions, to maintain attention and concentration for extended periods, to perform activities within a schedule, maintain regular attendance, respond appropriately to changes in work setting, and to be aware of normal hazards and take appropriate precautions, among other things. Unsurprisingly, based upon the academic and psychological evaluations, the Administrative Law Judge found that the Petitioner had not obtained any vocationally relevant past work.

At that point, prior to graduation, the Kanawha County School System was the only party with complete knowledge of Thomas' academic and functional failures. Thomas' parents had relied upon the representations of the Kanawha County School System and the implementation of the IEP to protect Thomas from academic and functional failure. Thomas' parents were never given proper notice of Thomas' academic failure. Fail safe conferences were never held as well as other acts and omissions relating to implementation of the IEP. Indeed, instead of properly implementing the IEP which would have meant notification to Thomas' parents of Thomas' falling below a C- in any course, the calling of an IEP meeting, possible re-evaluation of the IEP, remedial measures and other services, such as extension of the school year or holding Thomas back a grade, the Kanawha County School System chose to pass Thomas out of 12th grade unable to read, write or function in a work setting.

Thomas, having graduated as a functional illiterate, sought help from two sources: the Kanawha County School Board and the office of Vocational Rehabilitation Services. The minutes of the

Kanawha County School Board meeting of the 17th day of June 2007 reflect the fact that Thomas, post graduation, had attempted some post graduate remedy through the board, specifically the minutes state:

“Superintendent’s Presentation

“Superintendent Duerring explained that he brought this issue to the Board because there was a request for assistance which would have fallen into the settlement category since this special education student graduated this year. However, he stated, the student has now accepted services from Voc. Rehab.”” Kanawha County School Board Minutes of June 17th 2004 at P. 10.

While the minutes do not reflect the fulsome nature of the discussion or Thomas’s name (presumptively because of the sensitive nature of IEP services and confidentiality requirements) the minutes do reflect that Thomas had sought post-graduation assistance from the Board and, because (1) by law he was eligible for Vocational Rehabilitation Services simultaneously and (2) had graduated, his request for post-graduate assistance was dismissed. Importantly, the Superintendent correctly stated Sturm’s position which was that the school board’s obligation to Sturm was at an end upon Thomas’ graduation. See West Virginia State School Board Policy 2419, Section 2, A. 2.

Because Thomas had no further recourse within the Kanawha County School System, upon reaching the age of majority, Thomas filed this claim against the Board. In said claim, Thomas alleged eight counts: (1) that the Board violated Section 1401 of IDEA, which requires that school districts provide students with disabilities who reside in their districts with a free, appropriate public education; (2) That the Board violated Section 504 of the Rehabilitation Act, 29 U.S.C. Section 728 which prohibits discrimination against otherwise qualified persons on the basis of their disabilities by recipients of federal funding. (3) That the Board violated the Americans with Disabilities Act, 42

U.S.C. Section 12161 et. Seq. (hereinafter "ADA") prohibits against the discrimination against individuals with disabilities; (4) That the Board's actions and inactions under color of state law, have violated 42 U.S.C. Section 1983; (5) That the Board discriminated against Thomas under the West Virginia Human Rights Act, Code of West Virginia Chapter 5, Article 11, Section 1, et seq. (hereinafter the "HRA"); (6) The Board violated the provisions of West Virginia Code Chapter 18, Articles 1 through 4 et seq. all relating to the violation of the appellant's right to a free and appropriate public education, made actionable by West Virginia Code, Chapter 55, Article 7, Section 9; (7) That the Board failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent board of education, by deviating from the standards of care and/or carelessly and negligently failing to manage to educate the Appellant; and, (8) That the Board negligently inflicted severe emotional distress upon the appellant by holding him up to ridicule, denying him the right to an education, and otherwise, all of which resulting in damage and injury to the Appellant.

The Board then sought removal of the cause of action to Federal Court relating to the violations of federal law. United States District Chief Judge David A. Faber dismissed all of the Appellant's federal law claims without prejudice, finding that the Petitioner failed to exhaust his administrative remedies prior to filing his civil action. The Federal District Court then remanded the remaining claims back to the Kanawha County Circuit Court to assess the validity of the Appellant's state law claims.

Upon return to Circuit Court, the Defendant submitted a motion styled "Renewed Motion to Dismiss". Appellant answered. The trial court, although setting a hearing, did not hold said hearing and decided the motion on briefs. The trial court then erroneously dismissed Appellant's action. From that dismissal, Appellant now appeals.

III. ASSIGNMENTS OF ERROR AND AUTHORITIES

1. The trial court erred in granting Defendant's Motion to dismiss when genuine issues of material fact remained and no discovery had been obtained by either party.
2. The trial court erred in finding that the Appellant had failed to exhaust his administrative remedies when, in fact, no administrative remedies were available to Appellant as a matter of law.
3. That the trial court erred in finding that exhaustion of administrative remedies was dispositive as to the Appellant's ability to proceed with Appellant's other claims against Defendant.

IV. ARGUMENT AND DISCUSSION OF LAW

A. The Trial Court Erred in Granting Defendant's Motion to Dismiss While Material Facts were still in Dispute and No Discovery had been Obtained.

The trial court erred in granting Defendant's motion to dismiss because material facts were in dispute. Such facts include but are not limited to: what remedies were available to Appellant to pursue, if the Board owed Appellant a duty, and if the Board's actions impeded any administrative remedial action which could have been taken while Appellant was still in school prior to the Board choosing to graduate him.

1. Standard of Review:

A circuit court's entry of summary judgment is reviewed de novo. Syllabus point 2, *Estate of Bobby J. Robinson v. Randolph County Commission, Paul Brady sheriff of Randolph County*, 209 W.Va. 505, 549 S.E.2nd 699.

2. Discussion

In the instant case, the trial court erred in granting Defendant's motion to dismiss Appellant's

civil action while facts were still in dispute and prior to any discovery being had. This Court has held that:

“[o]nly matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6), and if it matters outside the pleading are not excluded. . . the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith.” *Robinson v. Randolph County, et al.*, 209 W.Va. 505, 549 S.E.2d 699 Syllabus point 2.

In the instant case the trial court made no comment in its order as to the actual facts in dispute or the existence of the state law claims that survived the dismissal of the federal claims. The trial court’s findings appear to be predicated entirely upon the finding that there was no federal jurisdiction based upon the federal court finding that the Appellant failed to exhaust his administrative remedies. Indeed, the findings of fact in the Court’s order were perfunctory and conclusory at best, concluding for instance that despite the Appellant’s allegations, the school board graduated him. The graduation is not proof of Defendant’s compliance and lack of culpability, but rather, in the face of all the school board’s failures to comply with the IEP and graduating Thomas despite his academic failing, proof of its negligence.

The trial court further erred in its granting of Defendant’s motion to dismiss by considering the conclusory findings of the Federal Court. The findings and order of the federal court were matters outside the parties’ original complaint and answers. This Court has held that,

“[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not

excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 (emphasis added in original). *Robinson v. Randolph County, et al.* 209 W.Va. 505 at _____, 549 S.E.2d 699 (W.Va. 2001).

This Court has further found that

“[a] complaint should not be dismissed on a Rule 12(b)(6) motion unless it appears beyond doubt there is no provable set of facts which would entitle the plaintiff to relief. *Owens v. Board of Education*, 190 W.Va. 677, 441 S.E.2d 398 (W.Va. 1994). . . [E]ven in the case of motions for summary judgment, time for adequate discovery should be allowed before consideration of the motion where there is a reasonable prospect that actionable facts can be obtained in the discovery process. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (W.Va. 1996). Our law favors cases being decided on their merits, and the standard for overcoming a 12(b)(6) motion is a liberal one with a light burden of proof. *John W. Lodge Distributing Co. v. Texas*, 161 W.Va. 603, 245 S.E.2d 157 (W.Va. 1978).” *Robinson v. Randolph County, et al.* 209 W.Va. 505 at _____, 549 S.E.2d 699 (W.Va. 2001). Albright, J., concurring.

Importantly, the Court has determined that a lack of opportunity for discovery prior to the granting of a dispositive motion to dismiss could be grounds for reversal. In *Robinson*, Justice Albright expounded on this error expressing concern for the fact that,

“it appear[ed] from the record that the Plaintiffs were denied any opportunity to conduct discovery and the motion to dismiss for failure to state a claim was granted upon a conclusion of law” and “[b]ecause the case below was cut off before discovery was even begun [the Court did] not know yet if the Plaintiffs [could] bring forth facts that tend[ed] to prove that, in all the circumstances of the case, [the Defendant] breached not some novel and sweeping duty, but his clearly established [duties]. *Robinson v. Randolph*

County, et al. 209 W.Va. 505 at _____, 549 S.E.2d 699 (W.Va. 2001).

See also, *Jackson, Administratrix of the Estate of Timothy J. Jackson v. Putnam County Board of Education*, 2007 WVSC 33038 (holding: Summary judgment is mandated in our courts where, after appropriate discovery, there is no legitimate dispute regarding a genuine issue of material fact impacting liability apparent from the record before the circuit court) [emphasis added].

B. The trial court erred in finding that the Appellant had failed to exhaust his administrative remedies when, in fact, no administrative remedies were available to Appellant as a matter of law.

In the case at bar, the trial court found that the Appellant failed to exhaust his administrative remedies and largely based its conclusion on the lack of development of the record before the Federal Court. The fact was and is that the Appellant had no remedies left to exhaust. According to *West Virginia State School Board Rule, Policy 2419* relating to the education of students with exceptionalities, students eligible for a Free and Appropriate Public Education are those who: “resid[e] in the district who are eligible for special education services, including students with disabilities who have been suspended or expelled from school as provided for in Chapter 7 [of this bulletin]. This includes students who reside in group, personal care, or foster homes, as well as state operated facilities and students who are migratory or homeless.

The district is obligated to make FAPE available to each eligible student in the district as follows:

... 2. Students who have not yet turned twenty-one years of age prior to September 1 and have not graduated with a standard high school diploma. . . [Emphasis added]

Equally, Section 3 of Policy 2419, titled Exceptions to FAPE provides,

“[That] [t]he obligation to provide FAPE does not apply to . . . Students who have graduated high school with a standard high school diploma. . . the term standard high school diploma does not include an alternative degree that is not fully aligned with the West Virginia Content Standards and Objectives, such as a certificate or a general educational development credential (GED).

C. That the trial court erred in finding that exhaustion of administrative remedies was dispositive as to the Appellant’s ability to proceed with Appellant’s State Law Claims against Defendant.

The trial court erred in finding that exhaustion of Appellant’s administrative remedies was dispositive as to the outcome of Appellant’s state law claims against Defendant. In *Ronnie Lee S. v. Mingo County Board of Education, et al.*, 201 W.Va. 667 at 668, 500 S.E.2d 292, at _____ (W.Va. 1997), Syllabus Point 2, the Court held that the action of a Petitioner, an autistic child, seeking a claim for damages and relief out of a defendant board of education’s alleged tortuous conduct against the child “[was not] subject to the exhaustion of [the] administrative remedies requirement. . .the Individuals with Disabilities Education Act and its West Virginia counter part having been enacted to assure children with disabilities ‘a free appropriate public education’ and the Act and its State counterpart have been enacted to generally expand the rights of children rather than restrict them.” In *Ronnie Lee S.* the Petitioners had exhausted administrative remedies on some matters relating to services. The Court specifically found, however, that the damage claim against the school board was resolved neither by the administrative process nor could it have been. Of equal importance to the Court was the reality of *Ronnie Lee S.’s* actual situation in maintaining a suit for damages. The Court

in support of its concern cited *Doe v. Alfred*, 906 F. Supp. 1092 (S.D.W.Va. 1995) wherein the Federal Southern District observed:

“There are, of course, exceptions to the exhaustion requirement. Parents need not avail themselves of the administrative process when (1) such process would be inadequate or futile; (2) the grievance process challenges generally applicable policies that are contrary to law; or (3) exhaustion will work a severe harm upon the litigant. . . . [T]he determination whether one of these “narrow” exceptions is applicable depends on ‘whether the pursuit of administrative remedies under the facts of a given case will further the general purpose of exhaustion and the congressional intent behind the administrative remedies scheme.’”

In the instant case, the Appellant’s access to administrative remedies was foreclosed by the actions of the Defendant in graduating Appellant. Appellant, first as a juvenile and later as a graduated student, has no standing to challenge the inadequacy of his individualized education plan. See *West Virginia State School Board Policy 2419* at Chapter 1, Section 2.A.2, [stating: “The district is obligated to make [a Free Appropriate Public Education] available to each eligible student in the district as follows: . . . Students who have not yet turned twenty-one years of age prior to September 1 and have not graduated with a standard high school diploma.”] [emphasis added]; and, W.Va. State School Board Policy 2419 at Chapter 1, Section 3, Exceptions to FAPE, The obligation does not apply to: Students who have graduated high school with a standard high school diploma. . . . The term standard high school diploma does not include an alternative degree that is not fully aligned with the West Virginia Content Standards and Objectives, such as a certificate or a general education development credential (GED). Applying the rules set out by the court in *Doe v. Alfred* as to when the exhaustion requirement should not apply, it is clear from the West Virginia State Board of Education Rule, Policy 2419 that Appellant, having graduated, did not have standing to contest his

circumstances. Thus administrative remedies, in Appellant's given case, would be futile. Because seeking administrative remedies would be futile, the trial court's decision dismissing the Petitioner's civil action for failure to exhaust administrative remedies should be reversed. Moreover, the Board of Education, by passing Appellant along without any educational progress actually having been made, and by concealing that fact from the Appellant's parents through the Board's failure to comply with the terms of the IEP, policies, procedures and the law, not only negligently but routinely deprived the Appellant of the free, appropriate, public education to which the law says he is entitled. Moreover, the Board of Education, having caused the damage by failing to adhere to its own policies and procedures and alerting Thomas' parents of the educational crisis their son was facing, assured that the Appellant and his guardians would not have adequate notice to file for due process or assert any claim for any other remedies. Thus, the trial court erred in allowing the Board of Education to assert the defense of failure to exhaust when (a) no remedy existed and (b) no notice of educational failure, as was required by the IEP, was ever given to the Appellant's parents so that they could assert such right to due process and other remedies as would be available to their son. The Appellant's parents could not exert curative administrative remedies if they were never advised of Appellant's lack of educational progress, as the school board had a duty to do per the IEP. The Appellant's parents could not file a grievance and avoid the protraction and expense of litigation for themselves or their son, because they did not know to do so and were affirmatively misled by the school board's actions in graduating Thomas. Therefore, under the test devised in *Doe v. Alfred* the pursuit of administrative remedies could not have furthered the general purposes of exhaustion and the congressional intent behind the administrative remedies scheme and, therefore, the trial court should be reversed.

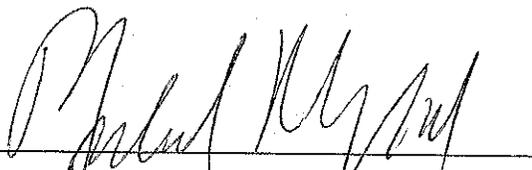
V. CONCLUSION

In sum and substance, it is readily apparent that, despite "No child left behind", Thomas Sturm was indeed left behind by the Kanawha County Board of Education. Rather than address his rather serious and severe limitations, he was routinely passed to the next grade until graduation. Rather than permitting him to continue attending vocational education courses where, at least, he could obtain a vocational skill, he was expelled from vocational school and not permitted to return. It is quite clear that the solution to the problem of Thomas Sturm was to give him a diploma, thus eradicating the responsibility of the defendant to Appellant.

For the foregoing reasons, your Appellant respectfully requests that this Honorable Court reverse the ruling of the Circuit Court of Kanawha County, the Honorable Tod Kaufman, Judge, presiding, that, thereafter, this matter be remanded back to the trial court for discovery and, if warranted, a trial on the merits.

THOMAS STURM

By counsel



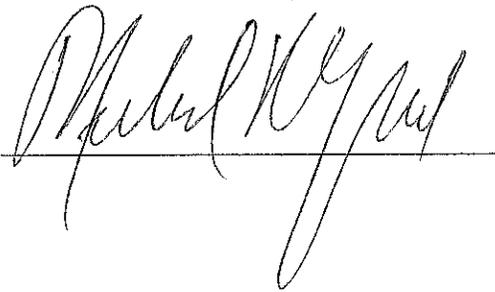
Michael T. Clifford (#750)
723 Kanawha Boulevard East
Union Building, Suite 300
Charleston, WV 25301
(304) 720-7660
(304) 720-7753 fax

Barbara Harmon-Schamberger(#7296)
P.O. Box 456
Clay, WV 25043

CERTIFICATE OF SERVICE

I, Michael T. Clifford, do hereby certify that I served a true and exact copy of the foregoing Appellant's Brief upon counsel of record, by depositing the same in the regular United States Mail, postage prepaid and properly addressed and/or by facsimile transmission this 26th day of March, 2008 to:

Kelly C. Morgan, Esquire
Bailey & Wyant
500 Virginia Street East
P.O. Box 3710
Charleston, WV 25337-3710

A handwritten signature in cursive script, appearing to read "Michael T. Clifford", is written over a horizontal line.