
No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRY HILL, Appellant,

v.

GREGORY BRENT STOWERS, Appellee.

BRIEF OF APPELLEE

Honorable Jay M. Hoke
Circuit Court of Lincoln County
Civil Action No. 06-C-52

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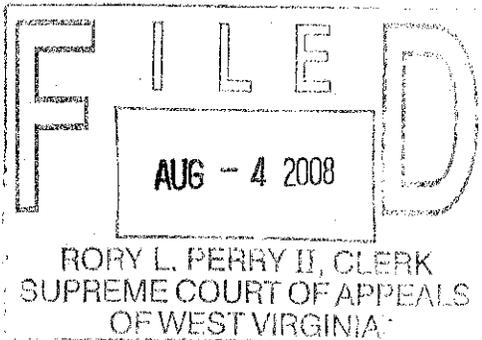


TABLE OF CONTENTS

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW 1

II. STATEMENT OF FACTS 1

III. DISCUSSION OF LAW 7

 A. Jurisdiction 7

 1. Motion to Dismiss 7

 2. Motions to Recuse 8

 B. Standard of Review 8

IV. ARGUMENT AND DISCUSSION OF LAW 8

 A. Motion to Dismiss 8

 1. Appellant Had a Fundamental Right to Run for Office but He Had No
Corresponding Right to Win. 9

 2. There is No Recognized Private Actionable Interest in a Publicly Elected
Position. 11

 3. Appellant is Not Entitled to Damages. 13

 4. West Virginia Law Provides the Appropriate Statutory Recourse in
Which to Pursue Election Complaints, and Such Statutory Scheme Does
Not Provide for Monetary Damages. 15

 a. The Circuit Court Does Not Possess Original Jurisdiction. . 16

 b. The Time Limit Provided in Which to Contest an Election Is
Strictly Construed. 16

 B. Motions to Recuse 18

V. CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Abbott v. Gordon, 2008 WL 821522 (Del. Super. March 27, 2008) 14

Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907, 910 (N.C. Ct. App. 1999) 14

Baer v. Gore, 79, W. Va. 50, 90 S.E. 530, 531 (1916) 17

Barone v. Barone, 294 S.E.2d 260 (W. Va. 1982) 9

Beverly v. Observer Pub. Co., 88 Ga.App. 490,77 S.E.2d 80, 81 (Ga. Ct. App. 1953) 14

Booth v. Board of Ballot Commissioners of Mingo County, 156 W. Va. 657,
196 S.E.2d 299 (1973) 15

Burke v. Supervisors of Monroe County, 4 W. Va. 371, 1870 WL 2055 (1870) 15

Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977) 8

Chrysler Corp. V. Todorovich, 580 P.2d 1123, 1134 (Wyo. 1978) 14

Flinn v. Gordon, 775 F.2d 1551, 1554 (11th Cir. 1985), cert denied, 476 U.S. 1116 (1986) ... 10

Gordon v. Leatherman, 450 F.2d 562, 567 (5th Cir. 1971) 9, 10

Grimes v. Miller, 448 F.Supp.2d 664, 673 (D. Md. 2007) 12

Guzman Flores v. College of Optometrists, 106 F.Supp2d 212, 215 (D. Puerto Rico 2000) ... 12

Hutchinson v. Miller, 797 F.2d 1279 (4th Cir.1986) 8, 12, 13, 14, 15

Meisel v. O'Brien, 142 W. Va. 74, 77, 93 S.E.2d 481 (1956) 10

Miller v. County Commission of Boone County, 208 W. Va. 263,
539 S.E.2d 770, 774 (2000) 18

Page v. Columbia Natural Resources, Inc., 480 S.E.2d 817 (W. Va. 1996) 9

Parks v. City of Horseshoe Bend, Arkansas 10

<u>Peer</u> 2008 WL 2047978 at 11	15
<u>Peer v. Lewis</u> , 2008 WL 2047978 (S.D. Fla. May 13, 2008)	11
<u>Pritt v. The Republican National Committee</u> , 557 S.E.2d 853 (W. Va. 2001)	9
<u>Qualls v. Bailey</u> , 152 W. Va. 385, 390, 164 S.E.2d 421, 425 (1968)	16
<u>Shields v. Booth</u> , 238 Ky. 673, 38 S.W.2d 677 (1931)	11, 12, 15
<u>Snowden v. Hughes</u> , 321 U.S. 1 (1944)	11
<u>Southwestern Publishing Co. V. Horsey</u> , 230 F.2d 319, 322-23 (5 th Cir. 1956)	14
<u>Southwestern Publishing Company</u> , 230 F.3d at 322-23	15
<u>State ex rel. Billings v. City of Point Pleasant</u> , 194 W. Va 301, 460 S.E.2d 436 (1995)	9, 10
<u>State ex rel. Daugherty v. Lincoln County Court</u> , 127 W. Va. 35, 31 S.E.2d 321 (1944)	10
<u>State ex rel. Hager v. Oakley</u> , 154 W. Va. 528, 177 S.E.2d 585 (1970)	10, 12, 16
<u>State ex rel. Myers v. Garner</u> , 148 W. Va. 92, 133 S.E.2d 82 (1963)	10
<u>State ex rel. Myers v. Garner</u> , 148 W. Va. 92, 133 S.E.2d 82 (1963)	10
<u>State ex rel. Staley v. Wayne County Court</u> , 137 W. Va. 431, 73 S.E.2d 827 (1953)	12, 17
<u>State ex. rel Mahan v. Claypool</u> , 97 W. Va. 670, 125 S.E. 810 (1924)	15
<u>Taylor v. Beckham</u> , 178 U.S. 548 (1900)	11
<u>Terry v. Sencindiver</u> , 153 W. Va. 651, 171 S.E.2d 480 (1969)	15
<u>Velez v. Levy</u> , 401 F.3d 75, 87 (2 nd Cir. 2005)	12
<u>Warner v. Kittle</u> , 167 W. Va. 719, 280 S.E.2d 276 (1981)	8
<u>Zaleski v. West Virginia Physicians Mut. Ins. Co.</u> , 647 S.E.2d 747 (W. Va. 2007)	8

OTHER AUTHORITIES

18 U.S.C. § 597 1

W. Va. Code § 3 15-17

W. Va. R. Civ. P. 12(b)(6) 1, 7, 8

W. Va. R. Civ. P. 33 3

W. Va. R. Civ. P. 34 3

W. Va. Trial Court Rule 17.01 3-5, 18

W. Va. Trial Court Rule 17.02 4

W. Va. Trial Court Rule 17.05 8

W. Va. Trial Court Rule 22.02 7

BRIEF OF APPELLEE

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

After having lost a 1996 election to Appellee Greg Stowers (hereinafter "Appellee"), ten years later in 2006 Appellant Terry Hill (hereinafter "Appellant") filed a Complaint against Appellee in the Circuit Court of Lincoln County seeking monetary redress for such election defeat. On September 15, 2006, Appellee filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Following multiple motions by Appellant to recuse Circuit Judge Jay Hoke and the entire 25th Circuit judiciary -- each of which was denied by the Circuit Court and confirmed by Administrative Order of this Court -- on October 1, 2007, the Circuit Court granted Appellee's Motion to Dismiss.

Appellant now seeks to have this Court to accept the wholly novel premise that there exists a private cause of action for damages for a losing electoral candidate, to remand the case back to the Circuit Court, and to appoint another circuit judge.

II. STATEMENT OF FACTS

During the 1996 general election for the Office of Circuit Clerk of Lincoln County, both Appellee and Appellant ran write-in campaigns. (June 5, 2006 Complaint at par. 5). Appellant lost by 605 votes. (*Id.* at par. 7). He did not, however, contest the election before the County Commission. (Transcript of October 23, 2006 hearing at p. 21). Instead, ten years later, he filed a Complaint against Appellee in the Circuit Court of Lincoln County seeking compensation for his losing effort.

On December 29, 2005, Appellee pleaded guilty in the United States District Court for the Southern District of West Virginia to a one count Information for violation of 18 U.S.C. § 597

(Expenditures to Influence Voting). (December 27, 2005 Plea Agreement and Information). Although Appellant asserts that Appellee “was the organizer, leader, manager and supervisor of the criminal activity to buy votes in the Lincoln County election for at least a fifteen year period” (Appellant’s brief at p. 4), Appellee’s guilty plea clearly related only to the May, 2004 primary election in Lincoln County. (Plea Agreement, at ¶ 5 and Information). As a result of his guilty plea, on May 9, 2006 Appellee was sentenced to six months imprisonment. Subsequently, on June 5, 2006, Appellant filed a lawsuit claiming entitlement to monetary relief via compensatory and punitive damages from Appellee. Specifically, Appellant sought compensatory damages including “the amount of compensation, benefits and emoluments that [Appellee] received in the office of Lincoln County Circuit Clerk and which compensation benefits and emoluments should have been received by [Appellant]” (June 5, 2006 Complaint at ¶ 55). Appellant alleges vote buying as the basis for his claims against Appellee.

However, as recognized by the Court below, even when considered in the light most favorable to Appellant, such Complaint is not actionable, is misplaced, and is at odds with public policy. Therefore, on September 15, 2006 Appellee filed a Motion to Dismiss the Complaint. Ultimately, on October 1, 2007, after considering briefing and hearing argument by the parties, the Circuit Court dismissed the Complaint. (October 1, 2007 Final Order Granting Rule 12(b)(6) Motion to Dismiss). In so ruling, the Circuit Court held “in accordance with WVTCR Rule 22.02, this Court has the discretion to give motions to dismiss priority status . . . it is now necessary and proper for this Court to determine this issue at this time, particularly in the interest of justice and the interest of judicial economy” (*Id.* at unnumbered pp. 4-5). In the intervening period, Appellant filed three motions to recuse, each of which was denied after investigation by the Circuit Court, and

each of which was reviewed, and affirmed, by this Court. (October 10, 2006 letter from Judge Hoke to the West Virginia Supreme Court of Appeals; April 5, 2007 letter from Judge Hoke to the West Virginia Supreme Court of Appeals; October 12, 2006, April 17, 2007, and September 20, 2007 Administrative Orders).

It must be noted that the Appellant's brief contains a number of baseless allegations against the Circuit Court.¹ These allegations demand context.

The Complaint in this case was filed June 5, 2006. Appellant served discovery on Appellee on Friday, July 14, 2006. Pursuant to West Virginia Rules 33 and 34 of the West Virginia Rules of Civil Procedure, Appellee had 30 days in which to respond to such discovery. Less than one week later, however, via a letter to the Court dated Thursday, July 20, 2006, Appellant filed his first request for recusal. Appellant's discovery had been outstanding only 6 days. At that point, proceedings were necessarily stayed pursuant to West Virginia Trial Court Rule 17.01(b).

Notably, Appellant's letter not only sought to have Judge Hoke recuse himself, but, in fact, sought to have Judge Hoke ascent to the recusal of the entire 25th Circuit Judiciary (July 20, 2006 letter, "... we believe that proper grounds exist for a motion to disqualify the circuit judges [plural] in the 25th Circuit" "... so that the Chief Justice may appoint a special judge from outside of

¹For example, Appellant asserts he was denied the opportunity for discovery in this case (Appellant's brief at p. 1), and alleges that the Circuit Court converted Appellant's initial request for voluntary recusal into a formal motion to recuse merely so that the Court could rule without delay on Appellee's request (Appellant's brief at p. 2, footnote 2). As the facts bear out, this is not accurate. As a result of outstanding motions, including Appellant's motions to recuse, discovery was not yet due at the time the Circuit Court resolved the Motion to Dismiss. Moreover, a motion to dismiss is to be determined on the sufficiency of the Complaint alone in order to "weed out unfounded suits" (October 1, 2007 Final Order at unnumbered p. 2), and Appellant's claim is not actionable regardless of any factual inquiry that may ever be gleaned through discovery. Finally, West Virginia Trial Court Rule 22.02 permits the Circuit Court to accord motions to dismiss priority status.

the 25th Circuit.” (emphasis supplied)). More notable still, the West Virginia Standards of Professional Conduct dictate against writing letters to the court in connection with a pending action. Therefore, in deference to Appellant - - and not in an effort for the Court to rule without delay on the Motion to Dismiss, as Appellant alleges - - Appellee (and, ultimately, the Court) treated such correspondence as a motion, and responded accordingly. (July 21, 2006 Response to Plaintiff’s Letter to the Court Requesting Consideration Pursuant to Rule 17.02 of the West Virginia Trial Court Rules).

Pursuant to Rule 17.1(c) of the West Virginia Trial Court Rules, on October 10, 2006 Judge Hoke forwarded Appellant’s letter as well as the Complaint to the Honorable Robin Jean Davis, Chief Justice of the West Virginia Supreme Court of Appeals for review. (October 10, 2006 letter from Judge Hoke to West Virginia Supreme Court of Appeals). Judge Hoke indicated that he did not intend to recuse himself, stating, “I firmly believe that I can be fair and impartial in the proceeding.” On Thursday, October 12, 2006, the West Virginia Supreme Court issued an Administrative Order finding that “the evidence set out in support of the disqualification motion is insufficient to warrant such disqualification,” and directing Judge Hoke to continue to preside over the case. (October 12, 2006 Administrative Order). Thereafter, on Friday, October 13, 2006, Appellant filed a motion to compel a response to discovery -- which at that point, considering the stay pending the recusal motion, had only been outstanding for six days. Therefore, the discovery was not even due at that point, let alone past due such that a motion to compel was warranted. However, yet again, within one week of such motion, on Thursday, October 19, 2006, Appellant filed a second motion to disqualify. At that point, proceedings were again stayed pursuant to West Virginia Trial Court Rule 17.01(b). Appellant’s discovery had then been outstanding only 12 days.

On October 23, 2006, the Circuit Court held a hearing on this second motion to disqualify and ultimately, after hearing argument, and again determining not to recuse (Transcript of October 23, 2006 hearing), on April 5, 2007, again referred the matter to the West Virginia Supreme Court of Appeals for consideration. (April 5, 2007 letter from Judge Hoke to West Virginia Supreme Court of Appeals). This concession was made to Appellant despite the fact that Rule 17.01 makes no allowance for second motions to disqualify. In his letter, Judge Hoke recounts that during the hearing on the second recusal motion, he inquired of both Appellant, who was present in the courtroom, and his counsel as to whether they objected to Judge Hoke reviewing relevant Court records and/or public records relative to the issues raised. They had no objections. Id.

The results of Judge Hoke's follow-up research as detailed in his April 5, 2007 letter to Justice Davis revealed as follows:

- that during the times that [Appellant] has run for various political offices in Lincoln County, West Virginia, he has never been successful;
- that although he has been unsuccessful every time he has run, the [Appellant] has never filed for a re-count of an election result or an election contest, and had never been denied any relief whatsoever in that regard by Judge Hoke;
- that the [Appellant] has been involved in other litigation in the Lincoln County Court system and has never before, even while Appellee was the Court's Clerk, complained of any alleged bias or prejudice;² and
- that the [Appellant's] family has been involved in other litigation in the Lincoln County Court system and has never before, even while Appellee was the Court's Clerk, complained of any alleged bias or prejudice from the Circuit Court.³

²In fact, Judge Hoke inquired of Appellant during the October 23, 2006 hearing whether or not he had felt prejudiced by Judge Hoke in th prior proceedings in which Appellant or his family members had been involved in his courtroom, and Appellant responded that he did not. (Transcript of October 23, 2006 hearing at pp. 13, 18).

³Id.

(April 5, 2007 letter from Judge Hoke to the West Virginia Supreme Court of Appeals at p. 2)

Further, on the issue of potential bias or prejudice, or even the appearance of such, Judge Hoke wrote:

Within that context, it should be noted that during the year of the election in question, 1996, this Court was sitting as the Judge in Lincoln County when Ms. Shirley Mullins, the former Circuit Court Clerk, announced her retirement and subsequently retired. Given the vacancy, the Chief Judge of the Circuit, E. Lee Schlaegel, Jr., appointed Mr. Stowers, the [Appellee], as the new Circuit Court Clerk. As the Chief Judge, Judge Schlaegel had the authority to appoint the Circuit Court Clerk without any advise and consent from me, and he did so. (Parenthetically, Judge Schlaegel appointed the present Circuit Court Clerk in the same manner when Mr. Stowers resigned his office, and created the vacancy thereby in 2006). As a result, I was not involved in Mr. Stowers taking office by his appointment, and the Code of Judicial Conduct restrict any participation on my part in any of his election efforts, either for or against the [Appellant] or any subsequent candidate(s). However, Judge Schlaegel, the Judge that did appoint Mr. Stowers, continued on the bench, subsequently serving periodically as Chief Judge until he announced his retirement and subsequently retired, effective December 31, 2006. Given the administrative lag in appointing a successor Judge by the Governor, Judge Schlaegel continued to serve as Special Judge in this Circuit, in that he has Senior Status and is eligible to so serve. With the recent appointment by the Governor, however, of Judge Thompson, Judge Schlaegel no longer is serving in this Circuit as such.

With the retirement of Judge Schlaegel and the appointment of a new judge, Judge Thompson, I believe that I have taken any and all necessary steps to obviate any possible allegation of influence from him in his position as the serving Chief Judge, or Special Judge, of this Circuit in the decision-making process in this matter. It was from this perspective that I again reviewed and considered the allegations made by the [Appellant] in support of his second WVTCR Rule 17.01 Motion.

(Id. at pp. 2-3).⁴

Having again reviewed the matter as set forth in the Circuit Court's letter, together with the record of the case to that point, on April 17, 2007, this Court again entered an Administrative Order in this matter ordering that Judge Hoke continue to preside over the case. (April 17, 2007 Administrative Order).

However, during an April 6, 2007 hearing, and at a follow-up hearing in August, 2007, Appellant requested that the Circuit Court forward the transcript of the October 23, 2006 hearing, at which the Motion to Dismiss was argued, to the West Virginia Supreme Court of Appeals for review. (Transcript of April 6, 2007 hearing at p. 4). Thereafter, following the Chief Justice's further review of the record, including the transcripts of the arguments below and the pleadings and arguments relative to Appellant's Motion to Dismiss, this Court directed yet a third time that Judge Hoke should continue to preside over the case. (September 20, 2007 Administrative Order).

Thereafter, on October 1, 2007, pursuant to West Virginia Trial Court Rule 22.02 (noting that motions to dismiss may be given priority status) and Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, the Circuit Court granted Appellee's Motion to Dismiss. This Appeal followed.

III. DISCUSSION OF LAW

A. Jurisdiction

1. Motion to Dismiss

The Circuit Court's order granting the Motion to Dismiss Appellant's Complaint is a final order appealable to this Court. However, as detailed below, the appeal is without merit.

⁴Additionally, during the October 23, 2006 hearing on the matter, Judge Hoke noted, "I don't think I was ever a candidate at the same time [Appellant] was a candidate." (Transcript of October 23, 2006 hearing at p. 13).

2. Motions to Recuse

Appellant also seeks review of the Circuit Court's recusal rulings. However, pursuant to West Virginia Trial Court Rule 17.05:

All rulings and orders relating to recusal or disqualification of a judge shall be considered interlocutory in nature and not subject to direct or immediate appeal.

W. Va. Trial Ct. R. 17.05.

In any event, this Court has already reviewed the Circuit Court's decision in that regard three times, and has affirmed those rulings. It should continue to affirm that sound decision.

B. Standard of Review

Review of a Circuit Court's dismissal of a Complaint pursuant to Rule 12(b)(6) is *de novo*. Zaleski v. West Virginia Physicians Mut. Ins. Co., 647 S.E.2d 747, 753 (W. Va. 2007).

IV. ARGUMENT AND DISCUSSION OF LAW

A. Motion to Dismiss

*"We can find no other case in which a defeated candidate has won such compensation."*⁵

Even when considered in the light most favorable to Appellant, he can prove no set of facts in support of his claim which would entitle him to relief. Warner v. Kittle, 167 W. Va. 719, 280 S.E.2d 276 (1981); Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977).

⁵Hutchinson v. Miller, 797 F.2d 1279, 1286 (4th Cir. 1986), cert denied, 479 U.S. 1088 (1987).

A review of the relevant case law underscores this conclusion. Notably, however, Appellant's brief is void of much of this relevant case law, including United States Supreme Court precedent.⁶

To permit compensation to a losing party in an election would place undue burden on both the political and judicial processes, providing no benefit to society and likely opening flood gates of litigation to disgruntled defeated candidates. As a result, no court has validated such a cause of action, which likely explains the dearth of any supporting case law on point in Appellant's brief.

1. **Appellant Had a Fundamental Right to Run for Office but He Had No Corresponding Right to Win.**

*"Insofar as the United States Constitution is concerned, an elector may vote for a good reason, a bad reason, or for no reason whatsoever"*⁷

With no supporting case law, Appellant makes several leaps in his argument on appeal. The first such leap is in equating the right to run for office with an asserted right to actually win, and to hold office. Appellant has a constitutional right to run for office (which he exercised when he made a losing bid for the office of Circuit Clerk of Lincoln County, West Virginia; in fact, he has made several such losing bids since 1992 (April 5, 2007 letter from Judge Hoke at p. 2)). State ex rel. Billings v. City of Point Pleasant, 194 W. Va 301, 460 S.E.2d 436 (1995). Appellant misconstrues

⁶Each of the cases cited by Appellant in attempt to support his cause of action have little, if anything, to do with the facts here and do not support a private cause of action for monetary damages to a losing candidate in an election for public office. See, e.g., Page v. Columbia Natural Resources, Inc., 480 S.E.2d 817 (W. Va. 1996) (addressing the discharge of an at will employee); Pritt v. The Republican National Committee, 557 S.E.2d 853 (W. Va. 2001) (defamation and libel claim against a political organization which raised no salient issue as to whether a losing candidate is personally entitled to money damages from the winning candidate on the basis of alleged wrongdoing in the election); and Barone v. Barone, 294 S.E.2d 260 (W. Va. 1982) (addressing interests in wills and heirship).

⁷Gordon v. Leatherman, 450 F.2d 562, 567 (5th Cir. 1971).

the Billings case, however. Clearly, it does not stand for the proposition that he has a fundamental constitutional right to win elected office. He does not.

In Billings, this court highlighted not only the fundamental right to run for elected office, but also the fact that both winners and losers are inherent to, and contribute to, the electoral process. Therefore, it is unnecessary to compensate losers of electoral contests for the natural result of the democratic process. See also, Parks v. City of Horseshoe Bend, Arkansas, 480 F.3d 837, 840 (8th Cir. 2007) (“There is no constitutional right to be elected to a particular office”); Flinn v. Gordon, 775 F.2d 1551, 1554 (11th Cir. 1985), cert denied, 476 U.S. 1116 (1986) (although Plaintiff “certainly had a constitutional right to run for office and to hold office once elected, he had no constitutional right to win an election”). Someone must lose, regardless of the reason. That Appellant now asserts that the fact that he lost by an overwhelming 605 votes must have been the result of vote buying, is of no moment. As the Fifth Circuit Court of Appeals has stated:

There is a fundamental difference between the expulsion or removal of a public official by the state and that same activity by the voters Any governmental body is required to act fairly, but that is not true as to a voter. Insofar as the United States Constitution is concerned, *an elector may vote for a good reason, a bad reason, or for no reason whatsoever*”

Gordon v. Leatherman, 450 F.2d 562, 567 (5th Cir. 1971). (Emphasis supplied.)

Indeed, election contests were unknown at common law. State ex rel. Hager v. Oakley, 154 W. Va. 528, 177 S.E.2d 585 (1970); State ex rel. Myers v. Garner, 148 W. Va. 92, 133 S.E.2d 82 (1963); Meisel v. O’Brien, 142 W. Va. 74, 77, 93 S.E.2d 481, 483 (1956); State ex rel. Daugherty v. Lincoln County Court, 127 W. Va. 35, 31 S.E.2d 321 (1944).

2. **There is No Recognized Private Actionable Interest in a Publicly Elected Position.**

“An individual cannot recover damages for a lost election.”⁸

The principle is well settled, and a matter of United States Supreme Court precedent, that publicly elected positions are matters of public domain, not private interest. Therefore, a losing electoral candidate – even one who is alleging voter fraud such as Appellant – has no private interest in the position of Circuit Clerk of Lincoln County, West Virginia, from which damages might flow. See Taylor v. Beckham, 178 U.S. 548 (1900); Snowden v. Hughes, 321 U.S. 1 (1944). In Taylor, the governor of Kentucky claimed to have been deprived of property, namely his political position since, he alleged, the recount election ousting him from office was marred by voter fraud. The United States Supreme Court rejected his claim in short order:

The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such . . . [G]enerally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.

Taylor, 178 U.S. at 577.

Indeed, in an analogous case, Shields v. Boothe, 238 Ky. 673, 38 S.W.2d 677 (1931), the court held that the loss of a nomination because of bribery of voters does not provide a cause of action for damages. Instead, the appropriate remedy for any such purported wrongs must be found in other proceedings. As the Shields court noted:

The remedy for wrongs of that character, if carried to an extent that affected the result of the election, was for the unsuccessful candidate to institute a contest, where he could protect his own rights and vindicate the rights of the public as well. His abstract right to be

⁸Peer v. Lewis, 2008 WL 2047978 (S.D. Fla. May 13, 2008).

elected was conditioned upon his ability to get the majority of votes.

Shields 38 S.W.2d at 680. See also, Grimes v. Miller, 448 F.Supp.2d 664, 673 (D. Md. 2007) (holding that the plaintiff had no “constitutionally protected interest in life, liberty or property . . . in her elected office.”); Velez v. Levy, 401 F.3d 75, 87 (2nd Cir. 2005) (a plaintiff “lacks a constitutional cognizable property interest in her employment as an elected official”); Guzman Flores v. College of Optometrists, 106 F.Supp2d 212, 215 (D. Puerto Rico 2000) (finding “the right to be a candidate for elective office is not a fundamental right”); Hutchinson v. Miller, 797 F.2d 1279 (4th Cir.1986), cert. denied, 479 U.S. 1088 (1987).

As the Fourth Circuit Court of Appeals recognized in Hutchinson when it declined to even consider any award of damages in an election dispute, “states are primarily responsible for their own elections, and . . . alternative remedies are adequate to guarantee the integrity of the democratic process.” (Internal quotations omitted). Hutchinson, 797 F.2d at 1283. As discussed in detail in Section IV A. 4. below, appropriate remedies exist in the State of West Virginia—via election contest or prosecution—to vindicate the election process, if necessary.

Moreover, alleged losses, including loss of income, loss of earning capacity, time expended for election purposes, various election expenses, and injury to reputation would have resulted from election defeat absent any alleged conspiracy, and “the loss of a public official’s salary is, ipso facto, an element of each and every political defeat.” Id. at 1285. As a result, an election contest is purely a constitutional or statutory proceeding and is regulated wholly by state constitutional or statutory provisions. State ex rel. Staley v. Wayne County Court, 137 W. Va. 431, 73 S.E.2d 827 (1953); Hager, 154 W. Va. 528.

3. Appellant is Not Entitled to Damages.

“ . . . the general attitude of courts asked to consider election disputes has been one of great caution. Intervention has come only in rare and extraordinary circumstances . . . [and] has never included the grant to defeated candidates of monetary compensation.”⁹

To permit a claim for monetary damages in this instance would run afoul of public policy, and of the authorized West Virginia statutory scheme for election contests, setting a dangerous precedent not heretofore recognized in the United States Supreme Court, in the Fourth Circuit Court of Appeals, or by this Court. As the Fourth Circuit Court of Appeals recognized:

Plaintiffs, who voluntarily entered the political fray, would stand to reap a post election recovery that might salve feelings of rejection at the polls or help retire debts from the campaign, but would bear very little relationship to the public interest in partisan debate and competition undeterred by the prospect of a post-election suit for damages.

Maintenance of this action might also provide incentives to losing candidates to ignore the principal routes established to challenge an election and to proceed instead to have the election reviewed in federal courts in hopes of gaining monetary compensation.

A suit for damages, by contrast, may result principally in financial gain for the candidate. We can imagine no scenario in which this gain is the appropriate result of the decision to pursue elected office, and we can find no other case in which a defeated candidate has won such compensation. Nor do we believe, in light of the multitude of alternative remedies, that such a remedy is necessary either to deter

⁹Hutchinson, 797 F.2d at 1287 (4th Cir. 1986).

misconduct or to provide incentives for enforcement of election laws.

Hutchinson, 797 F.2d at 1285 - 1286. (Emphasis supplied)

Appellant seeks to disparage the Hutchinson case as not relevant here (Appellant's brief at pp. 14-16). However, Appellant's brief is notably absent of any cases holding a counter position, that is, any cases that actually support his argument that he is entitled to pursue a private cause of action for compensatory and punitive damages. In contrast, the position of the Hutchinson case in this regard is repeated time and again in both state and federal courts across the country. See e.g., Beverly v. Observer Pub. Co., 88 Ga.App. 490, 77 S.E.2d 80, 81 (Ga. Ct. App. 1953) (holding that special damages for the loss of a public office in an election are "too remote and speculative to be recoverable"); Southwestern Publishing Co. V. Horsey, 230 F.2d 319, 322-23 (5th Cir. 1956) (holding that "the loss of an election is not compensable in damages, being too uncertain and too speculative"); Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1134 (Wyo. 1978) (damages resulting from a lost election in the amount of the lost salary in public office are "remote, uncertain and conjectural or speculative damages"); Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907, 910 (N.C. Ct. App. 1999) ("This, in essence, is a suit to recover damages for a lost election. We do not consider it the place of this court to engage in post-election analysis of the decisions made by the voters . . . in this or any other election"); Abbott v. Gordon, 2008 WL 821522 (Del. Super. March 27, 2008) (unpublished).

Beyond the fact that there is simply no private interest in a public office, and, thus, no damages allowable, proof of causation in a lost election case is impossible. Because there are "no less than a thousand factors which enter into the vagaries of an election," Appellant here could never

prove actual damages. Southwestern Publishing Company, 230 F.3d at 322-23; Peer 2008 WL 2047978 at 11.

For all of the foregoing reasons, Appellant's alleged offenses against Appellee, if any, being matters of public rather than private interest, are ones to be redressed, if at all, by prosecution or by election contest. Of course, the first such remedy has already occurred here.¹⁰ Shields, 238 Ky. at 679; See also, Hutchinson, 797 F.2d 1279.

4. West Virginia Law Provides the Appropriate Statutory Recourse in Which to Pursue Election Complaints, and Such Statutory Scheme Does Not Provide for Monetary Damages.

The State of West Virginia has provided detailed statutory mechanisms as the appropriate recourse for unsuccessful electoral candidates to contest elections. (W. Va. Code §§ 3-7-6 and 3-7-7), and for the state to pursue prosecution, if it so desires. (W. Va. Code §§ 3-8-12 and 3-8-13). To permit a claim for monetary relief as sought by Appellant in this case would unlawfully bypass these statutorily mandated procedures.

The West Virginia legislature has long ago set forth in detail the appropriate course to be followed if an unsuccessful candidate seeks to contest an election, even on the basis of illegality or fraud. W. Va. Code §§ 3-7-6 and 3-7-7; Burke v. Supervisors of Monroe County, 4 W. Va. 371, 1870 W.L. 2055 (1870); State ex. rel Mahan v. Claypool, 97 W. Va. 670, 125 S.E. 810 (1924); Terry v. Sencindiver, 153 W. Va. 651, 171 S.E.2d 480 (1969); Booth v. Board of Ballot Commissioners of Mingo County, 156 W. Va. 657, 196 S.E.2d 299 (1973). Simply put, Appellant here has not followed the clearly defined course set by statute. The statute does not provide for monetary

¹⁰By making note of Appellee's December 29, 2005 guilty plea to a crime involving the May, 2004 primary election, Appellee is in no way conceding that it is in any way relevant to Appellant's claims of wrongdoing in the 1996 election.

damages, nor does it provide for complaint to be made in the Circuit Court, particularly at this late date.

a. The Circuit Court Does Not Possess Original Jurisdiction.

W. Va. Code § 3-7-7 contemplates that the County Commission, and not the Circuit Court, is the court of original jurisdiction for election disputes, which are to be carried out pursuant to the provisions of W. Va. Code § 3-7-6. Specifically, W. Va. Code § 3-7-7 provides, “The county court [county commission] shall hear and decide election contests.” Indeed, this has been the law of this state from its formation. Qualls v. Bailey, 152 W. Va. 385, 390, 164 S.E.2d 421, 425 (1968); Hager, 154 W. Va. 528 (the circuit court cannot hear an election contest case in the first instance).

b. The Time Limit Provided in Which to Contest an Election Is Strictly Construed.

Not only did Appellant contest the election in the wrong arena, having also failed to contest the results of the 1996 general election of which he now complains in the ordinary, proper, and timely course, Appellant has forfeited his right, if any, to do so. The West Virginia statutory scheme requires an election contest to commence within ten days of the election results. W. Va. § 3-7-6.

Specifically, W. Va. Code § 3-7-6 provides:

A person intending to contest the election of another to any county or district office, including judge of any court or any office that shall hereinafter be created to be filled by the voters of the county or of any magisterial or other district therein, shall, within ten days after the result of the election is certified, give the contestee notice in writing of such intention and a list of the votes he will dispute, with the objections to each, and of the votes rejected for which he will contend. If the contestant objects to the legality of the election or the qualification of the person returned as elected, the notice shall set forth the facts on which such objection is founded. (Emphasis supplied).

That did not happen here; not within the required ten days; not ever. During the October 23, 2006 argument on Appellee's Motion to Dismiss, the following exchange took place:

The Court: . . . As to the factual background, was there no election contest filed in this case?

Ms. Thacker: There was not.

The Court: Is that right, Mr. Goldberg?

Mr. Goldberg: Yes, that's correct.

(Transcript of October 23, 2006 hearing at p. 21). Rather, nearly a decade later, Appellant sought to pursue his case in the Circuit Court. He did so on the wrong claim, in the wrong court and at the wrong time.

It is clear in the statutory language, and well settled in case law in interpreting such language, that the designated ten day time period in which to contest an election is mandatory, even as to alleged fraud or illegality, and must be strictly complied with in order to confer jurisdiction of the proceeding. Staley, 137 W. Va. at 438. The use of the word "shall" in the statute "leaves no way open for substitution of discretion." Staley, 137 W. Va. at 440, citing, Baer v. Gore, 79, W. Va. 50, 90 S.E. 530, 531 (1916). As the West Virginia Supreme Court recognized:

Evaluation of the foregoing statutes enacted in furtherance of the public policy above mentioned [diligent and timely action in ascertaining and declaring the final results of an election] brings the Legislative intent into bold relief: that an election result should be determined and declared with dispatch.

Id. (Emphasis supplied).

To the extent Appellant may argue that his interest in usurping the 1996 general election was not triggered prior to Appellee's December 29, 2005 guilty plea, such argument would be of no moment. The statute itself, and relevant case law, would have provided Appellant an opportunity to amend any notice to contest the election had he ever filed one in the first place. W. Va. Code §

3-7-6; Miller v. County Commission of Boone County, 208 W. Va. 263, 267, 539 S.E.2d 770, 774 (2000). He did not. As a result, his claim now must fail.

B. Motions to Recuse

Appellant's continued effort to recuse Judge Hoke should be rejected yet again as it is untimely, without merit, and has already been passed upon by this Court after a review of the record not once, not twice, but three times.

First, Appellant's Motions to Recuse were untimely. Pursuant to Rule 17.01(a) of the West Virginia Trial Court Rules, a motion for disqualification of a judge must be made within 30 days of discovering the alleged ground for disqualification. The Complaint was filed June 5, 2006. The Complaint alleged various claims purportedly stemming from illegal vote buying activities in Lincoln County, West Virginia, and Appellee's ultimate December 29, 2005 guilty plea thereto (albeit, solely with respect to the May, 2004 election). Appellant's initial letter to the Court requesting recusal was dated July 20, 2006, 45 days after the Complaint was filed. Appellant's second motion to disqualify was dated October 19, 2006, and the third review followed the April 6, 2007 hearing. Each of the Appellant's three motions to recuse, though based on the allegations in his Complaint, was filed weeks - indeed months - past the required 30 day time frame.

Nevertheless, Appellant has been provided more than a fair opportunity to be heard on this issue. The Circuit Court three times reviewed the recusal motion,¹¹ seriously considered and investigated whether there could exist any improper partiality, and permitted argument by Appellant on the matter. As the record in this case makes clear, Judge Hoke was not a candidate for office during any election in which Appellee was also a candidate (Transcript of October 23, 2006 hearing

¹¹This, despite the fact that Rule 17.01 of the West Virginia Trial Court Rules does not provide for second, let alone third, motions to recuse on the same asserted bases.

at p. 13), Judge Hoke had nothing to do with the appointment of Appellee to the office of Circuit Clerk of Lincoln County (April 5, 2007 letter from Judge Hoke to the West Virginia Supreme Court of Appeals at pp. 2-3), and Appellant has never before complained of unfair prejudice in any prior cases either he or his family members had before Judge Hoke, including during the time period when Appellee was serving as the Circuit Clerk (Id.; Transcript of October 23, 2006 hearing at p. 13, 18). As a result, Judge Hoke appropriately concluded that he could be fair and impartial in this case.

Likewise, this Court has now reviewed the record on the recusal motion three times, each with an increasing supporting record, and has three times found insufficient evidence to support recusal. Simply put, enough is enough.

V. CONCLUSION

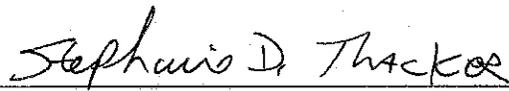
For all of the foregoing reasons, and for all other reasons which may be apparent to the Court, this Appeal must be denied. The Circuit Court appropriately granted Appellee's Motion to Dismiss. In summary, Appellant: 1) made an improper claim for damages, one for which relief simply can not be granted; 2) pursued in a court which lacked original jurisdiction to hear election disputes; and 3) filed at a time when the period provided for doing so had long since passed. As a result, Appellant can prove no set of facts which would entitle him to relief. To hold otherwise would open the flood gates of litigation with regard to every election in the State of West Virginia. If losing candidates can receive monetary awards, then every losing candidate in every election can simply assert alleged wrongdoing in the hope of a pay off. Indeed, since electoral offices are matters of public domain, conceivably every voter could then argue they have a right to monetary redress when they do not like the outcome of an election. Such a result is not supported by sound reasoning, or by the law.

Additionally, Appellant's multiple motions to recuse must again likewise be rejected.

GREGORY BRENT STOWERS

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRY HILL,

Appellant,

v.

GREGORY BRENT STOWERS,

Appellee.

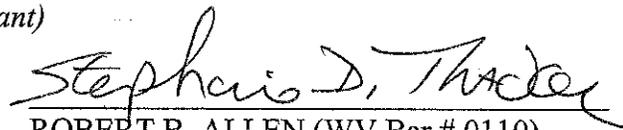
On Appeal from the Circuit
Court of Lincoln County
Civil Action No. 06-C-52

CERTIFICATE OF SERVICE

I, Stephanie D. Thacker, counsel for Appellee, do hereby certify that service of the foregoing "Brief of Appellee" was made upon Robert A. Goldberg and Larry G. Kopelman, counsel for Appellant, by facsimile, and depositing a true copy thereof in the regular course of the United States mail, postage prepaid, on this 4th day of August, 2008, addressed as follows:

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