

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel SCOTT EDWARDS,

Plaintiff/Appellee,

v.

Petition No. _____
Circuit Court of Putnam County, West Virginia
Civil Action No. 07-C-332
Honorable N. Edward Eagloski, II

LINDA L. GIBSON, Recorder for the City of
Hurricane, Putnam County, West Virginia;
DONALD E. CHANEY; WILLIAM R. BILLUPS;
C. BRIAN ELLIS; PATRICIA D. HAGER; and
LANA M. CALL, Members of the City Council
of the City of Hurricane, Putnam County,
West Virginia,

Defendants/Appellees,

v.

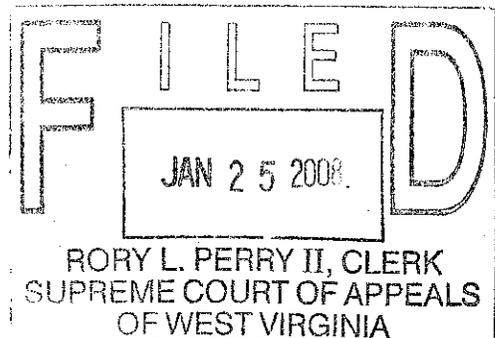
SAM E. COLE,

Intervener/Appellant.

**PETITION FOR APPEAL
ON BEHALF OF
SAM E. COLE**

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PETITION IN CIRCUIT COURT


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Comes now the Intervener, Sam E. Cole, by counsel, David O. Moye and Lisa M. Moye, and in support of his *Petition for Appeal*, files the following memorandum of law:

I. TYPE OF PROCEEDING & NATURE OF RULING OF THE CIRCUIT COURT

The Appellant in this matter was a candidate for Mayor in a municipal election held by the City of Hurricane, in Putnam County, West Virginia. After the election, the Appellant

filed a Complaint to contest the election in the Circuit Court of Putnam County, West Virginia. The civil action was assigned to Honorable O.C. Spaulding and a hearing was held on the 13th day of September, 2007, at which time the Circuit Court remanded the matter to the City of Hurricane for a hearing.

However, prior to the City of Hurricane holding the remanded hearing, the existing Mayor, Scott Edwards, who was elected in the subject election, filed a Petition for Writ of Prohibition and Order and Rule to Show Cause, which was filed as a new civil action and assigned to Honorable N. Edward Eagloski. At the hearing on said Petition, Honorable N. Edward Eagloski granted the writ of prohibition filed by Scott Edwards and thus prohibited the City Council of the City of Hurricane from holding the remanded hearing ordered by Honorable O.C. Spaulding.

II. STATEMENT OF FACTS

The Appellant, Sam E. Cole, was a candidate for Mayor of the City of Hurricane in an election held on the 12th day of June, 2007. Pursuant to W.Va. Code § 3-3-3, the citizens of Hurricane, Putnam County, West Virginia were permitted to vote prior to the aforesaid election date through early voting. However, the City of Hurricane failed to provide secrecy envelopes to hold and seal the ballots of the early voters. After the Appellant discovered that the City of Hurricane was accepting early votes without the use of secrecy envelopes, the Appellant challenged the same. However, the City of Hurricane, after consulting with the Putnam County Clerk, chose to continue accepting early votes without the use of secrecy envelopes. After counting all of the precinct ballots, the Appellant had won the election for Mayor. However, after the ballots of the early voters were counted, the City of Hurricane determined Scott Edwards to be the Mayor. The Appellant challenged the City of Hurricane's determination and requested a re-count and examination of the early ballots. After the re-count, the City of Hurricane declared Scott Edwards to be the Mayor.

On the 6th day of July, 2007, the Appellant provided the City of Hurricane and the Putnam County Commission with formal written notice that he was contesting the legality of the election held on June 12, 2007. A copy of said notice is attached hereto and incorporated herein by reference, marked as Exhibit One. Simultaneously therewith, the Appellant filed a Complaint to initiate the above-styled case, alleging: (1) the City of Hurricane violated W.Va. Code § 3-3-3 by failing to provide secrecy envelopes for the early voters; and (2) since the early ballots were not placed in secrecy envelopes with a seal to ensure the integrity of their votes, such ballots were improperly included by the City of Hurricane in determining the successful candidate for Mayor. The Complaint filed by the Appellant against the City of Hurricane is attached hereto and incorporated herein by reference marked as Exhibit Two.¹

On or about the 25th day of July, 2007, the Defendant, City of Hurricane, filed a Motion to Dismiss the Plaintiff's Complaint pursuant to W.Va. R. Civ. P. 12(b)(1), alleging that the Circuit Court was without subject matter jurisdiction to consider the Appellant's allegations. The hearing was conducted by Honorable O.C. Spaulding. Both the Appellant, Sam E. Cole, and the existing Mayor, Scott Edwards, were personally present at the hearing. At this time, counsel for the City of Hurricane and counsel for Sam E. Cole proffered their respective positions to the Court concerning the Circuit Court's jurisdiction on this matter. The City of Hurricane asserted that the newly elected City Council of the City of Hurricane should be given the opportunity to conduct a hearing on this matter and issue a decision prior to the Circuit Court ruling on the substantive issues set forth in the Complaint. Despite the Appellant's position that he had already contested this matter before the City of Hurricane, the Appellant had no objections to a full remanded hearing before the newly elected City

¹The Appellant notes that the Complaint was also filed against the County Commission of Putnam County. However, the County Commission was later dismissed as a party.

Council. Accordingly, the Circuit Court remanded the matter to the City of Hurricane for hearing. A transcript of the hearing held before Honorable O.C. Spaulding and a copy of the Order entered by Honorable O.C. Spaulding are attached hereto and incorporated herein by reference marked collectively as Exhibit Three.

The Appellant, by counsel, then filed a formal written Petition with the City of Hurricane setting forth his reason for contesting the election, *to wit*, the failure to use secrecy envelopes. However, prior to the City of Hurricane conducting the remanded hearing on this Petition, the existing Mayor, Scott Edwards, filed a Petition for Writ of Prohibition and Order and Rule to Show Cause, which was filed as a new civil action and assigned to Honorable N. Edward Eagloski, II, a copy of said Petition for Writ of Prohibition and Order and Rule to Show Cause are attached hereto and incorporated herein by reference, marked collectively as Exhibit Four. Within the Petition for Writ of Prohibition, Mr. Edwards argued that the Appellant had failed to provide him with notice of the election contest within the ten (10) day period set forth in W.Va. Code § 3-7-6.

The Appellant filed a Motion to Intervene in the new civil action along with a Motion to Consolidate the new civil action with the civil action previously presided over by Honorable O.C. Spaulding which resulted in the Order for the remanded hearing. The Appellant also filed an Answer to Mr. Edwards' Petition and a Motion to Dismiss the Writ of Prohibition. A hearing was held on Mr. Edwards' Petition for Writ of Prohibition on the 26th day of October, 2007 before Honorable N. Edward Eagloski, II.

At the hearing, the Court granted the Appellant's Motion to Intervene. Accordingly, counsel for the Appellant and Mr. Edwards argued their respective positions before the Court. Counsel for Mr. Edwards argued that Mr. Edwards was not served with notice of the election contest within the statutory time period of ten (10) days. In response, counsel for the Appellant argued that Mr. Edwards was constructively served since the Appellant filed

the prior civil action, which was assigned to Honorable O.C. Spaulding, within the ten (10) day period and since the Appellant served the Complaint and the subject statutory notice upon the City of Hurricane via certified mail the following business day. Counsel for the Appellant further argued that Mr. Edwards had appeared at the prior hearing held before Honorable O.C. Spaulding at which time the case was remanded and Mr. Edwards had failed to make any arguments regarding such notice. Thus, counsel for the Appellant argued that Mr. Edwards had waived any opportunity to then file a separate civil action challenging notice. Counsel for the Appellant further argued that the two (2) civil actions should be consolidated.

After considering counsel's arguments, the Court found that Mr. Edwards was not personally given notice of the election contest initiated by the Appellant and further found that the notice mailed by the Appellant's counsel to the City of Hurricane was not adequate in substance to comply with the notice provisions of W.Va. Code § 3-7-6 and was not delivered to the City of Hurricane until after the expiration of the ten (10) day period mandated by W.Va. Code § 3-7-6. Accordingly, the writ of prohibition prayed for in the Petition filed by Mr. Edwards in the new civil action was granted. A transcript of the hearing held before Honorable N. Edward Eagloski, II, and a copy of the Order entered by Honorable N. Edward Eagloski, II, are attached hereto and incorporated herein by reference, marked collectively as Exhibit Five.

III. ASSIGNMENT OF ERROR

The Circuit Court erred in failing to consolidate the two (2) civil actions referenced herein and further erred in dismissing the second civil action by finding that the Appellant failed to adhere to the notice provisions of W.Va. Code § 3-7-6.

IV. POINTS OF LAW & CITATIONS OF AUTHORITIES

- A. W.Va. Code § 3-3-3;
- B. W.Va. Code § 3-6-7;
- C. Rule 42 of the West Virginia Rules of Civil Procedure;
- D. Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997);
- E. *Palumbo v. The County Court of Kanawha County*, 151 W.Va. 61, 150 S.E.2d 887 (1966).

V. ARGUMENT

The Order entered by Honorable N. Edward Eagloski granting the writ of prohibition prayed for by Mr. Edwards essentially held the remand Order entered by Honorable O.C. Spaulding void and of no effect. These two (2) civil actions involved the exact same issue and the same parties. Accordingly, the Appellant argues that his Motion to Consolidate should have been granted and the Order entered by Honorable O.C. Spaulding should have been upheld by the Circuit Court. The Court's failure to consolidate the cases pursuant to W.Va. R. Civ. P. 42 resulted in two (2) completely opposite rulings from the Circuit Court of Putnam County, West Virginia regarding the exact same issue and the same parties.

Therefore, the Appellant argues that the doctrine of *res judicata* prohibits the Circuit Court from considering the second civil action filed by Mr. Edwards. In discussing this doctrine, the West Virginia Supreme Court of Appeals has held as follows:

"Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

In this case, all three of the *res judicata* factors are present. Honorable O.C. Spaulding entered an Order as a final adjudication remanding the case to the City of Hurricane for hearing and dismissing the case from the Circuit Court's docket. The two (2) actions involve the same parties and the cause of action identified for resolution in the second proceeding, *to wit*, whether the City of Hurricane should conduct a hearing, is identical to the cause of action determined in the prior civil action. The first Order entered in the first civil action ordered the City of Hurricane to hold a remanded hearing on the substantive issues raised in Mr. Cole's Complaint. The second Order entered in the second civil action prohibits the City of Hurricane from conducting a hearing on the substantive issues.

In regard to the issue on which the Court granted Mr. Edwards' Petition for Writ of Prohibition, *to wit*, whether Mr. Edwards was served with notice of the election contest pursuant to W. Va Code § 3-7-6, the Appellant respectfully submits that a strict reading of the statute results in making an election contest impossible if the contestee can not be personally served within the subject ten (10) days. The Appellant properly raised the issue of the legality of the votes of the early voters by filing a Complaint with the Circuit Court praying that the early votes be set aside due to the City of Hurricane's willful failure to utilize secrecy envelopes. The Complaint was filed within the ten (10) day period and served upon the City of Hurricane the following business day which the Appellant admits was outside of the ten (10) day period.

However, the Appellant argues that the filing of the Complaint within the ten (10) day period protects the election contest. Otherwise, if an individual thought an election was going to be contested, the individual could purposely make service impossible until after the ten (10) day period set forth in the statute. Accordingly, this strict reading of the statute could result in an illegally conducted election being upheld only because the contestee purposely make himself unavailable for service. In discussing the reading of statutes in

elections contests, the Supreme Court has stated the following:

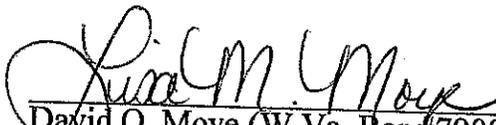
"Statutes providing for election contests should be liberally construed, in order that the will of the people in the matter of choosing their public officers may not be defeated by merely technical objections." *Palumbo v. The County Court of Kanawha County*, 151 W.Va. 61, 150 S.E.2d 887 (1966) (quoting *Mullens v. Dunman*, 80 W.Va. 586, 92 S.E. 797 (1917)).

Therefore, the Appellant contends that the intent of W.Va. Code § 3-6-7 was upheld in this matter by the Appellant's filing of the Complaint within the subject ten (10) day period. However, even if the Court properly concluded that Mr. Cole failed to provide the statutory notice, Mr. Edwards did not have standing to raise this issue in a second civil case. Mr. Edwards was essentially given the opportunity to relitigate the same case with the same issue before a different court in an attempt to reach an opposite result.

VI. PRAYER

WHEREFORE, for the reasons set forth herein, the Appellant prays that this Court accept his *Petition for Appeal*, reverse and vacate the *Order* of the Circuit Court of Putnam County, West Virginia and grant him such other further and general relief as the Court deems appropriate.

SAME. COLE
By Counsel



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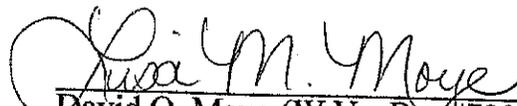
Intervener/Appellant.

CERTIFICATE OF SERVICE

We, David O. Moye and Lisa M. Moye, counsel for Appellant, Sam E. Cole, hereby certify that service of the foregoing *Petition for Appeal* was made upon the following counsel on the 9th day of January, 2008, by mailing a true and exact copy thereof, postage prepaid, to the following addresses:

Harvey D. Peyton, Esq.
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