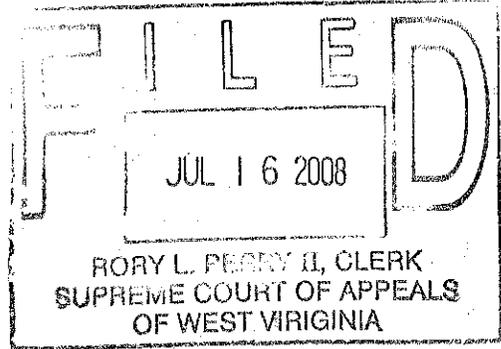


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34144

JENNIFER L. CARUSO,
Plaintiff Below, Appellant,

vs.



BRIAN N. PEARCE and P&T TRUCKING, INCORPORATED,

Defendants/Third-Party Plaintiffs Below, Appellees,

vs.

QUALITY MACHINE CO., INC., GARRY K. KNOTTS and JOYCE K. HALL,

Third-Party Defendants Below, Appellee.

**BRIEF OF APPELLEES, BRIAN M. PEARCE
AND P&T TRUCKING, INCORPORATED**

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COPY

NO. 34144

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

JENNIFER L. CARUSO,

Plaintiff Below,
Appellant,

vs.

BRIAN N. PEARCE and
P&T TRUCKING, INCORPORATED,

Defendants and Third-Party
Plaintiffs Below,
Appellees,

vs.

QUALITY MACHINE CO., INC.,
GARRY K. KNOTTS and JOYCE
K. HALL,

Third-Party
Defendants Below,
Appellees.

FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA
HONORABLE IRENE C. BERGER

**BRIEF OF APPELLEES, BRIAN M. PEARCE
AND P&T TRUCKING, INCORPORATED**

The appellees, Brian M. Pearce and P&T Trucking, Incorporated, submit this
Brief pursuant to Rule 3(f) of the Rules of Appellate Procedure West Virginia Supreme Court of
Appeals.

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

On October 12, 2004, the appellant, Jennifer L. Caruso, by counsel, filed an action in the Circuit Court of Kanawha County, West Virginia, one month before the statute of limitations was to have run for injuries allegedly sustained in an automobile accident which occurred on November 8, 2002. On November 10, 2004, the appellees, Brian M. Pearce & P&T Trucking, Incorporated, served their answer to the complaint, along with interrogatories and requests for production upon the plaintiff. The appellant, after requesting and being granted an extension to do so, answered and responded to the discovery over four months after it was served by mail on March 8, 2005.

There was no discovery or in-court action taken by the appellant in the referenced civil action for over two years. As there had been no order or proceeding for over one year by any party, the Circuit Court of Kanawha County provided notice as required that it would strike the underlying action from its docket, pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, absent good cause.

On October 12, 2007, the Circuit Court of Kanawha County, West Virginia, after hearing the arguments of the appellant and considering the entire record of this Civil Action, dismissed the subject action due to the appellant's failure to prosecute the same.

II. STATEMENT OF FACTS

On October 12, 2004, the appellant, Jennifer L. Caruso, by counsel, filed Civil Action No. 04-C-2728 in the Circuit Court of Kanawha County, West Virginia for events that

arose almost two years earlier on November 8, 2002. A timely Answer was served by the appellees, Brian M. Pearce and P&T Trucking, Incorporated. Pretrial discovery then commenced by the appellees, Brian M. Pearce and P&T Trucking, Incorporated, in the form of interrogatories and requests for production to the appellant. Answers and responses were provided by the appellant on March 8, 2005, after receiving an extension of time in which to answer and respond. Other parties were subsequently added to the matter and the last initiated discovery was the service of answers to interrogatories and responses to requests for production served by appellees upon additional appellees, Brian M. Pearce and P&T Trucking, Incorporated, which were answered and responded to on July 12, 2006. The filing of July 12, 2006, by the appellees was the last order or proceeding in the case prior to the Court's dismissal of the same.

The appellant neither served written discovery nor deposed any party or witness from the time of the institution of this Civil Action. When the Circuit Court of Kanawha County served notice to all parties on July 31, 2007, stating that a review of the docket indicated that there had been no activity or prosecution of the styled case in the past year and that, pursuant to West Virginia Rules of Civil Procedure Rule 41(b), the matter would be dismissed from the Court's docket unless the appellant filed a motion alleging good cause why the action should not be dismissed, and the appellant, for the first time, began efforts to keep the case from being dismissed.

Although having never sought to take any depositions or pursue other discovery in this matter from the time of the filing of the Complaint on October 12, 2004, the appellant, by counsel, apparently after receiving the Notice of July 31, 2007, from the Court regarding the pending dismissal, sent a letter and requested mediation in the matter on August 1, 2007, to

counsel. (See Exhibit A: Exhibit 1 to Defendants and Third-Party Plaintiffs, P&T Trucking, Incorporated's and Brian N. Pearce's, Motion for Protective Order Preventing Depositions and Further Discovery.)

By letter of August 6, 2007, Attorney Teresa Kleeh, counsel for appellees, Quality Machine Co., Inc. and Garry Knotts, advised appellant's counsel that ... "we will obviously await the Court's determination regarding your Motion requesting a stay of the pending dismissal" before proceeding further in the matter. Ms. Kleeh further advised appellant's counsel that, if the Court were to refrain from dismissing the case, it would appear that there was significant discovery remaining in the matter. (See Exhibit A: Exhibit 2 to Defendants and Third-Party Plaintiffs, P&T Trucking, Incorporated's and Brian N. Pearce's, Motion for Protective Order Preventing Depositions and Further Discovery.)

Subsequent to the Motion Requesting Stay of Dismissal, appellant's counsel, on August 10, 2007, filed an Amended Motion Requesting Stay of Dismissal and, on August 16, 2007, served a Notice of Hearing setting forth that this Court would hear the said issue on October 4, 2007, at 10:30 a.m.

The appellant subsequently made efforts to schedule depositions and, by facsimile transmission of August 29, 2007, served a Notice of Deposition for James Taylor (witness listed on Uniform Traffic Report) for September 12, 2007, at 3:00 p.m., and served a Notice of Deposition for Sgt. J.E. Elmore (investigating officer) for September 12, 2007, at 3:30 p.m.

By letter of August 29, 2007, Stephen F. Gandee, counsel for appellees, Brian M. Pearce and P&T Trucking, Incorporated, by facsimile transmission, advised appellant's counsel that it was his opinion that, pending the Court's hearing on October 4, 2007, and a ruling on the

plaintiff's Motion Requesting Stay of Dismissal, the depositions noticed for Mr. Taylor and Sgt. Elmore were not proper and requested that said depositions be cancelled. (See Exhibit A: Exhibit 3 to Defendants and Third-Party Plaintiffs, P&T Trucking, Incorporated's and Brian N. Pearce's, Motion for Protective Order Preventing Depositions and Further Discovery.)

By letter dated August 29, 2007, but sent via facsimile on August 30, 2007, appellant's counsel advised counsel for Brian M. Pearce and P&T Trucking, Incorporated that she would not agree to cancel the depositions of Mr. Taylor and Sgt. Elmore based on the pending Motion to Stay Dismissal of Action and that she intended to proceed with the litigation of this matter. (See Exhibit A: Exhibit 4 to Defendants and Third-Party Plaintiffs, P&T Trucking, Incorporated's and Brian N. Pearce's, Motion for Protective Order Preventing Depositions and Further Discovery.)

On August 30, 2007, the office of appellant's counsel again requested additional deposition dates. Prior to any response, on August 30, 2007, a Notice of Deposition for John Spadafore at Affiliated Physical Therapy was served, via facsimile, setting his deposition for September 19, 2007, and separate Notice of Deposition was served, via facsimile, for Dr. Lynch of Morgantown, setting his deposition for October 2, 2007.

By letter sent via facsimile late on August 30, 2007, counsel for Brian M. Pearce and P&T Trucking, Incorporated again advised appellant's counsel that, pending the ruling by the Court on the Motion to Stay Dismissal of Action, he was of the opinion that the noticed depositions were not proper and requested that the same not occur pending the hearing on the appellant's Motion Requesting Stay of Dismissal. (See Exhibit A: Exhibit 5 to Defendants and Third-Party Plaintiffs, P&T Trucking, Incorporated's and Brian N. Pearce's, Motion for Protective Order Preventing Depositions and Further Discovery.)

By letter dated August 30, 2007, but received, via facsimile, on August 31, 2007, appellant's counsel responded without agreeing to cancel the above referenced depositions pending her Motion Requesting Stay of Dismissal and Amended Motion Requesting Stay of Dismissal. (See Exhibit A: Exhibit 6 to Defendants and Third-Party Plaintiffs, P&T Trucking, Incorporated's and Brian N. Pearce's, Motion for Protective Order Preventing Depositions and Further Discovery.)

Accordingly, Brian M. Pearce and P&T Trucking, Incorporated, by counsel, filed a Motion for Protective Order, which was granted by the Circuit Court of Kanawha County by Order Granting Protective Order and Staying Discovery entered on September 6, 2007. (See Exhibit B.)

Subsequently, a hearing was held on October 4, 2007, on the motion by the appellant requesting a stay of dismissal. The Circuit Court of Kanawha County, having heard the arguments of counsel and having considered the record, including the appellant's motion and memorandum in support thereof, and the objections of appellees' counsel, entered an Order dated October 12, 2007, denying the appellant's motion and ORDERED that the matter be dismissed and stricken from the Court's docket.

III. ASSIGNMENT OF ERROR AND MANNER DECIDED BELOW

Whether the Circuit Court of Kanawha County properly used its discretion in ordering that the plaintiff's action, Civil Action No. 04-C-2728, be dismissed and stricken from the docket of the Court pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, where the plaintiff had failed to prosecute her case and the record was void of any order or

proceeding in the case for over one year without good cause being shown by the plaintiff for her neglect in pursuing the action?

IV. POINTS AND TABLE OF AUTHORITIES RELIED UPON

Cases

Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976) 14

Arlan's Dept. Store of Huntington v. Conaty, 253 S.E.2d 522 at 526 (W. Va. 1979) 9

Belington Bank v. Masketeers Co., 408 S.E.2d 316 (W. Va. 1991) . 8

Brent v. Bd. of Trust of Davis & Elkins Coll., 311 S.E.2d 153, at p. 157 (W. Va. 1983) 8

Cristanelli v. United States Lines, 74 F.R.D. 590 (1977) 14

Gray v. Johnson, 165 W. Va. 156, 267 S.E.2d 615 (W. Va. 1980) . 13

Huffmaster 13

Huffmaster at 123 13

Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960) 13

Messenger v. United States, 231 F.2d 328 (1956) 13

Moore v. Tefon Communications Corp., 589 F.2d 959 (9th Cir. 1978) 14

Moore v. United States, 231 F.2d 328 (2nd Cir. 1956) 14

Murray v. Roberts, 117 W. Va. 44, 183 S.E. 688 (1936) 9

Nealey v. Transportation Maritima Mexicana, S.A., 662 F.2d 1275 (9th Cir. 1980) 14

Perlick & Co. v. Lakeview Creditors Trustee, 298 S.E.2d 228 (W. Va. 1982) 8

Rule 41 of the Federal Rules of Civil Procedure 13

Saylor 14

Saylor v. Lindsley, 71 F.R.D. 380 (1976) 13

Sec. and Exchange Com'n v. Everest Management Corp., 466 F. Supp. 162 (S.D.N.Y. 1979) 14

Snyder v. Hicks, 170 W. Va. 281, 294 S.E.2d 83 (1982) Syllabus . 9

Taylor v. Smith, 301 S.E.2d 621 (W. Va. 1983) 9

West Virginia Rules of Civil Procedure Rule 41(b) 3

White Sulphur Springs, Inc. v. Jarrett, 124 W. Va. 486, 20 S.E.2d 794 (1942) Sy. Pt. 4 9

White Sulphur Springs, supra, at p. 796 10

Statutes

W. Va. Code § 58-8-9 8

Other Authorities

Arlan's Dept. Store of Huntington 9
Gray 13
Messenger v. United States, 231 F.2d 328 (2nd Cir. 1956) 14
Rule 41(b) 8, 9, 12, 14
Rule 41(b) of the West Virginia Rules of Civil Procedure . 2, 6, 8

V. DISCUSSION OF LAW

A review of the facts and the relevant law leads to the inescapable conclusion that no good cause exists for the appellant's failure to prosecute her claims and, accordingly, the trial court properly exercised its discretion in dismissing and striking the subject action from the docket of the Court.

Rule 41(b) of the West Virginia Rules of Civil Procedure vests with the trial court's discretion to order an action dismissed from its docket wherein for more than one year there has been no order or proceeding. W. Va. Code § 56-8-9 also provides such authority to the trial court; however, Rule 41(b) controls over the statute as it expands, modifies, and supersedes it. Perlick & Co. v. Lakeview Creditors Trustee, 298 S.E.2d 228 (W. Va. 1982).

Rule 41(b) allows reinstatement of an action upon motion within three (3) terms after the entry of the order. However, this court has uniformly held that good cause must be shown before an action can be reinstated under this rule. Belington Bank v. Masketeers Co., 408 S.E.2d 316 (W. Va. 1991). This Court has further required that one moving for reinstatement must make a showing of good cause which "adequately excuses his neglect in prosecution of the case." Brent v. Bd. of Trust of Davis & Elkins Coll., 311 S.E.2d 153, at p. 157 (W. Va. 1983) (emphasis added). Except in unusual cases, trial courts cannot relieve a party of the

consequences of failure to comply with [Rule 41(b)]. Arlan's Dept. Store of Huntington v. Conaty, 253 S.E.2d 522 at 526 (W. Va. 1979).

This Court has consistently held that dismissal under this statute or rule is within the sound discretion of the trial court and absent a clear showing of abuse of such discretion, a trial court's decision to dismiss an action will not be disturbed upon appeal. Taylor v. Smith, 301 S.E.2d 621 (W. Va. 1983); Snyder v. Hicks, 170 W. Va. 281, 294 S.E.2d 83 (1982) Syllabus; White Sulphur Springs, Inc. v. Jarrett, 124 W. Va. 486, 20 S.E.2d 794 (1942) Sy. Pt. 4; Murray v. Roberts, 117 W. Va. 44, 183 S.E. 688 (1936).

In the instant case, the Circuit Court of Kanawha County, West Virginia, after reviewing the appellant's Motion for Reinstatement, and upon hearing oral argument of counsel, found that over one year had lapsed in the action without a proceeding or order and that there was no good cause for the appellant's actions, and properly denied the motion requesting stay of dismissal, therefore, dismissing the case. As the Circuit Court of Kanawha County, West Virginia did not abuse its discretion in this regard, the matter was properly dismissed.

The Rules of Civil Procedure provide for just, speedy, and inexpensive determinations and provide for the orderly process of civil cases of which time periods are an integral part. Arlan's Dept. Store of Huntington, supra.

While the appellant below filed a motion for reinstatement within three (3) terms of the dismissal, she did not make a showing of good cause that adequately excuses her neglect in the prosecuting of the aforesaid action. Due to her failure to show good cause, the trial court did not abuse its discretion in failing to reinstate the matter on its dockets.

The only attempt by the appellant in her motion for reinstatement to show good cause for her neglect is to look at the matter with hindsight after dismissal and cast blame upon someone other than themselves, in this case, counsel for the appellees and the Circuit Court Judge, for allowing the case to grow stale. This attempt is made despite the requirement that counsel must show cause which adequately excuses her neglect. In White Sulphur Springs, supra, at p. 796, this Court stated that if “. . . fraud, or other adventitious circumstance, beyond the control of the plaintiff . . .” prevents action by the plaintiff, abuse of discretion would occur if reinstatement did not occur (emphasis added). No such burden has been met by the plaintiff in this matter.

From the outset of the civil action, the appellant has demonstrated a pattern of procrastination in the prosecution of this suit. The summons and complaint were filed only one month prior to the running of the statute of limitations for the action. The appellant then proceeded to request an extension of time to answer and respond to interrogatories and requests for production. Further, the appellant instituted no discovery, filed no motions, took no depositions, nor did she take any action or institute any proceeding after filing her complaint and answering discovery on March 8, 2005, over two years prior to the Circuit Court noticing the dismissal of this action. Thus, during the four year and eight months period between the date of the accident and the dismissal order by the Court for failure to prosecute, the appellant filed a complaint, answered interrogatories, and responded to requests for production, and agreed to allow the appellees to add additional parties to this action. Any attempt by the appellant to claim that she was the victim and that others were the cause of her neglect are completely without merit.

Further, for the appellant to claim that she was “stonewalled” in her attempts to prosecute the case after the Circuit Court of Kanawha County provided notice of a pending dismissal and that the appellees “tied her hands” is a red herring and simply does not address the issue of whether good cause existed for the appellant’s failure to prosecute her case from October 12, 2004, to the notice of impending dismissal by the Circuit Court.

The appellant asserts in her petition that discovery was almost complete. The appellees take exception to this allegation for two reasons. First, if the appellant believed that she had concluded all of the discovery she desired, the inquiry must be made as to why the appellant never took the initiative to simply make a call to the Court to get this matter scheduled for trial. The appellant’s attempt here is to blame the Circuit Court of Kanawha County. In fact, the appellant asserts for one of her reasons that the pending case is a complex case. It could be expected that closer attention might be given to a complex case than was given in this case by the appellant. There is no difficulty in determining how to get a case to trial in Kanawha County, West Virginia. Practice in the northern part of the State cannot be a legitimate reason for failing to contact the Circuit Court of Kanawha County.

Secondly, appellees represent that significant discovery remained to be concluded. Appellees’ counsel routinely performs significant discovery when a case in which appellant has the burden to prosecute their case is proceeding properly. Discovery depositions of witnesses and experts would have been noticed and taken by the appellees. Further, the appellees would have obtained an independent medical examination of the appellant, Jennifer L. Caruso, prior to trial, as well as possibly discovery depositions of the additional witnesses learned throughout

discovery. Finally, the appellees would have obtained counter-experts to any experts which the appellant may have disclosed.

However, it was clear to the appellees from the appellant's action that the appellant had no desire to pursue this matter; therefore, the appellees did not engage in the aforementioned significant discovery, as such was not timely and would have grown stale pending a trial date. As can be seen from the progress (or lack thereof by the appellant) of the case, had the appellees actively pursued the above discovery, expensive updates would have been necessary prior to any trial.

The Circuit Court of Kanawha County, West Virginia, in deciding the case before this Court, found that the appellant had failed to meet the good cause requirement to have her case reinstated. Therefore, no further analysis was needed by the Court. Had the Court found good cause existed, then further analysis would have been necessary in the form of determining whether reinstatement would clearly result in prejudice to the defendants.

Although not before the Court in this petition, had the referenced discovery been pursued by the appellees, the appellant would have benefited by an order or proceeding which would have prevented the dismissal of the case under Rule 41(b). Also, the information obtained by such discovery would have become stale since the appellant did not pursue a trial on the matter and all completed discovery would require supplementation. Further, should reinstatement of the case occur, the appellees may be prejudiced by being unable to locate potential witnesses that the discovery would identify and those which are located will likely have had lapses in their memories and recollection of the events at issue. Finally, should the appellant obtain a jury verdict, the appellant will benefit by her delay by being awarded prejudgment

interest from the appellees at a rate of ten percent (10%) per annum for a significant period of time which was considerably above the current market rate.

Regardless of this prejudice, the record is clear that the appellant's lack of diligence is inexcusable and severe and, thus, since a showing of good cause to justify the appellant's inaction did not exist, no showing of prejudice would be required under the authority cited by this court in Gray v. Johnson, 165 W. Va. 156, 267 S.E.2d 615 (W. Va. 1980).

In Gray, several cases, including Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960) and Saylor v. Lindsley, 71 F.R.D. 380 (1976) were noted. A review of those cases reveals that the failure to prosecute standards adopted by those Courts permit the dismissal of an action without a showing of prejudice to the defendant where the plaintiffs' lack of diligence is clearly inexcusable and severe.

The Court, in Huffmaster, detailed the diligence necessary to prevent a dismissal under Rule 41 of the Federal Rules of Civil Procedure. With reference to Messenger v. United States, 231 F.2d 328 (1956), the Court stated:

On appeal, Judge Meding said, in a cogent presentation of the law, that the crucial test under Rule 41(b) is whether there has been reasonable diligence in the prosecution of the action, but that lack of prejudice to defendant may be considered in cases of moderate or excusable neglect. The application of Rule 41(b) is discretionary with the Court, and there are no rigid time limits which establish lack of due diligence when they are exceeded. (emphasis added)

Huffmaster at 123. While a lack of prejudice may be considered in cases of moderate or excusable neglect, the clear inference is that in cases of severe or unexcusable neglect, such as the instant case, the Court, in its discretion, may dismiss or refuse to reinstate any action without

regard to a lack of prejudice. In Saylor, the United States District Court for the Southern District of New York went so far as to state that the lack of diligence of a plaintiff, and not prejudice to the defendant, was the test to be employed by the Court in deciding whether an involuntary dismissal was appropriate. The question of prejudice was to be only one factor for the Court to consider in making the decision.

The holding that the lack of due diligence is the operative condition under Rule 41(b) is well supported. See Messenger v. United States, 231 F.2d 328 (2nd Cir. 1956); Moore v. United States, 231 F.2d 328 (2nd Cir. 1956); Moore v. Tefon Communications Corp., 589 F.2d 959 (9th Cir. 1978); and Sec. and Exchange Com'n v. Everest Management Corp., 466 F. Supp. 162 (S.D.N.Y. 1979). Many of the opinions on this issue have gone so far as to state that it is presumed an injury has resulted to the defendant from an unreasonable delay in prosecuting an action although this presumption of prejudice may be rebutted. Nealey v. Transportation Maritima Mexicana, S.A., 662 F.2d 1275 (9th Cir. 1980); Cristanelli v. United States Lines, 74 F.R.D. 590 (1977); and Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976).

This appeal is very simple on its face. The appellant took no action to prosecute her case and the Circuit Court of Kanawha County, West Virginia provided notice that it intended to dismiss the matter from the Court's docket. The Circuit Court heard from the appellant at a hearing and heard nothing to change its position on the appellant's inactivity.

RELIEF PRAYED FOR

WHEREFORE, as a result of the appellant's inaction, lack of diligence in pursuing the claim, and the correct finding of the Circuit Court of Kanawha County, Brian M.

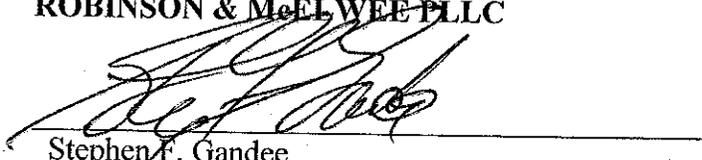
Pearce and P&T Trucking, Incorporated request that the Order of the Circuit Court of Kanawha County of October 14, 2007, be affirmed.

Dated this 15th day of July, 2008.

**BRIAN M. PEARCE and
P&T TRUCKING, INCORPORATED**

By Counsel

ROBINSON & McELWEE PLLC



Stephen F. Gandee
(W. Va. State Bar I.D.: 5204)

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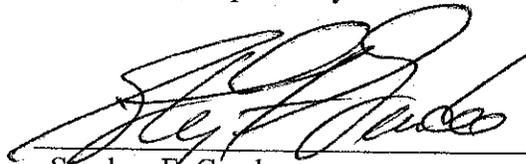
QUALITY MACHINE CO., INC.,
GARRY K. KNOTTS and JOYCE
K. HALL,

Third-Party
Defendants Below,
Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2008, I served the foregoing **Brief of Appellees, Brian M. Pearce and P&T Trucking, Incorporated** upon Kristine A. Burdette and Terri L. Tichenor, attorneys for appellant, upon Teresa Lewis Kleeh, attorney for appellees, Quality Machine Co., Inc. and Garry K. Knotts, and upon George A. Halkias, attorney for appellee, Joyce K. Hall, by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed to them at Whiteman Burdette, PLLC, Post Office Box 2798, Fairmont, West Virginia, 26555-2798, at Steptoe & Johnson PLLC, Post Office Box 1588,

Charleston, West Virginia 25326-1588, and at Martin & Seibert, L.C., 300 Summers Street, Suite 610, BB&T Building, Charleston, West Virginia, 25301, respectively.

A handwritten signature in black ink, appearing to read "Stephen F. Gandee", written over a horizontal line.

Stephen F. Gandee
(W. Va. State Bar I.D.: 5204)

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE