

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

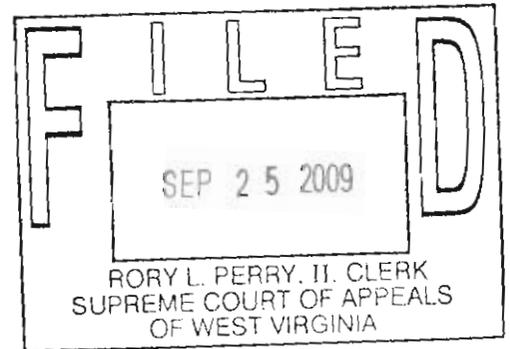
CHARLESTON, WEST VIRGINIA

NO. 35141

KIMBERLY THOMAS,
Petitioner/Appellant

vs.

JOSEPH B. MORRIS,
Respondent/Appellee.



**RESPONDENT/APPELLEE'S BRIEF IN RESPONSE TO
PETITIONER/APPELLANT'S BRIEF IN SUPPORT OF APPEAL**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CASES AND AUTHORITIES.....ii

NATURE OF PROCEEDING.....1

STATEMENT OF FACTS.....1

ARGUMENT A (B IN PETITIONER’S BRIEF).....7

ARGUMENT B (C IN PETITIONER’S BRIEF).....9

ARGUMENT C (D IN PETITIONER’S BRIEF).....11

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

TABLE OF CASES AND AUTHORITIES

CASES

State v. General Daniel Morgan Post No. 548, V.F.W.,
144 W. Va. 137, 145, 107 S.E. 2d 353, 358 (1959).....8

Arbaugh v. Board of Education of Pendleton County,
214 W. Va. 677, 683, 591 S.E. 2d 235, 242 (2003).....8

State v. Hanna, 378 S.E. 2d 640, 646 (W. Va. 1989).....9

STATUTES

West Virginia Code 48-27-202 (5).....8

NATURE OF PROCEEDING

This case is an appeal from the Circuit Court of Clay County, West Virginia, wherein the Family Court of Clay County, West Virginia refused to issue a domestic violence protective order on at least two separate occasions, the second of which was affirmed by the Honorable Richard A. Facemire, Chief Judge of the Circuit Court of Clay County, West Virginia. It is from this ruling by Judge Facemire that the Appellant, Kimberly Thomas (hereinafter "Thomas") seeks relief from this Honorable Court.

STATEMENT OF FACTS

Thomas and the Appellee, Joseph B. Morris (hereinafter "Morris") were previously engaged in a long-term romantic relationship, and during the latter part of December 2007, Thomas and Morris agreed to end their relationship. Not a scintilla of evidence has ever been produced that during the relationship either party engaged in any acts of which would constitute physical or emotional abuse of the other party. For a long period of the relationship, Thomas owned a mobile home in which she resided, and the mobile home was situate on a tract of land owned by Morris' son, and that tract of land was contiguous to land owned by Morris upon which he operated an automatic car wash that required regular maintenance and attention. It is also noteworthy that Morris lived at that time, and continues to live, approximately one-half mile from the car wash business and the tract of land upon which Thomas resided. To travel by vehicle from Morris' home to the location of Thomas' former residence, one must drive past the headquarters of the Clay County detachment of the West Virginia State Police.

During May 2008, Morris initiated contact with Thomas in an attempt to rekindle the relationship. Not only did Morris make contact with Thomas, but Thomas did, from May 19, 2008 until July 11, 2008, freely and voluntarily accept gifts from Morris, freely and voluntarily dined with Morris, and on several occasions Thomas visited Morris while he was hospitalized, and on at least one occasion Thomas and Morris engaged in romantic acts of hugging and kissing. Morris' sister, Emma Jean Legg, was present on at least three (3) occasions when Thomas visited Morris in the hospital.

It is also noteworthy that on the evening of July 11, 2008, Thomas visited Morris' home as an uninvited guest while Morris was entertaining other persons in his home's swimming pool. Thomas became angry during this visit to Morris' home, even though Morris attempted to explain the circumstances of the visit by the other guests to his home.

On July 13, 2008, Thomas has alleged that Morris visited his car wash property and upon seeing Thomas at the mobile home, she alleged that Morris came to the front porch of the home and attempted to speak with Thomas. Thomas alleges that she refused to speak to Morris. Thomas swore under oath that Morris banged on the door with a 3-foot long metal pipe, but the photographs of the door that were introduced into evidence revealed no marks or damage to the mobile home.

Morris has never had a key to Thomas' mobile home after they ended their relationship in December 2007.

Thomas also alleged that Morris parked his vehicle in such a manner that it blocked her use of the driveway to the mobile home. Morris denied ever blocking her use of the driveway.

It is interesting to note that during the second family court hearing following remand, the family court allowed proffered evidence by counsel and part of the proffered evidence was that former Clay County Sheriff Harold Fields took photographs and measurements to determine whether Thomas was actually prevented from using the driveway by Morris as she alleged during the first family court action. Proffer was accepted that Fields determined that Thomas was not blocked or otherwise prevented from using the driveway as she had alleged.

Later in the evening of July 13, 2008, Thomas and her companion vacated the mobile home and went to the residence of George Asseff, a person who lives approximately one-half of a mile from the mobile home. Notwithstanding Thomas' testimony that she did visit Asseff's residence on the evening of July 13, 2008, Asseff's testimony, as proffered to the family court and accepted by the family court, was that Thomas told him that she had left her keys in the car. Although Thomas had the opportunity to call for assistance by law enforcement while at Asseff's residence, she chose not to request the use of Asseff's telephone for such purpose. Instead, she chose to use Asseff's telephone to call a friend and request a ride. It was also Asseff's proffered testimony that Thomas did not appear upset or otherwise concerned for her or her companion's safety.

On July 14, 2008, Morris was again hospitalized and remained hospitalized until July 18, 2008. From July 14, 2008 until August 1, 2008, the cellular telephone records of Morris do indicate all contact the parties had with each other. Morris' cellular telephone records for the time period from July 14, 2008 to August 1, 2008 were entered into evidence in the family court.

On August 1, 2008, Thomas, an employee of the State of West Virginia with a salary of approximately \$35,000.00 per year went to the Magistrate Court of Kanawha County and requested an emergency domestic violence protective order. It is interesting to note that this protective order related to an emergency that Thomas alleged had occurred on July 13, 2008 in Clay County, West Virginia. Furthermore, Thomas did not make any allegations of any acts whatsoever by Morris toward her between July 14, 2008 and August 1, 2008.

A hearing scheduled before Judge Charnock for August 6, 2008 was continued until August 8, 2008 after Thomas requested a continuance of the hearing. On August 8, 2008, Judge Charnock transferred the matter to the Family Court of Clay County.

On September 3, 2008, the Family Court of Clay County took evidence and heard testimony and denied Thomas' request for a domestic violence protective order.

Thomas' attorney with Legal Aid of West Virginia, Inc., filed an appeal of the family court order from the September 3, 2008 hearing, and following a hearing before the Circuit Court of Clay County, at which Thomas failed to appear, the matter was remanded to the family court for the taking of further evidence and to make specific findings of fact and conclusions of law.

Upon remand, the family court allowed counsel to proffer any new evidence into the record and after hearing proffer and argument of counsel, the family court entered findings of fact and conclusions of law and again found that Thomas failed to meet the burden required to prove her allegation of domestic violence against Morris.

Again, Thomas' counsel from Legal Aid of West Virginia, Inc. appealed the ruling by the family court where it found that Thomas had failed to meet her burden of proof with respect to her allegations that Morris had committed an act of domestic violence against her.

The circuit court denied the Thomas' appeal, and it is from that denial of Thomas' appeal by the circuit court that this appeal is taken by Thomas.

It is interesting to note that Counsel for Thomas failed to point out that during the long relationship there was never a complaint of domestic violence against either party and that the only act of alleged domestic violence occurred on the evening of the 13th day of July, 2008.

It is further interesting to note that Counsel for Thomas on several occasions in all of his pleadings sets forth statements regarding the fact that Morris carried a gun for which he had a legal permit and there is not one bit of evidence that at any time during the relationship and especially during the period of time from May 19, 2008, to July 13, 2008, did Morris ever have the gun in his personal possession or ever exposed the gun to the members of the general public and/or personal view by Thomas herself. There is only the self-serving statements set forth by Counsel for Thomas that Thomas had knowledge of the gun permit. Are all persons who have legally obtained permits to carry guns, including many of our veterans, to be diminished in character or be suspected of domestic violence for this act alone?

Furthermore, at the first hearing before the Family Court of Clay County, Morris presented testimony regarding his relationship with Thomas and at the second hearing before the Family Court of Clay County, West Virginia, presented proffered testimony of former Sheriff Harold Fields and George Asseff which has been set out hereinabove and the only testimony presented by Thomas was from the person present on the evening of the 13th day of July, 2008, a person later married to Thomas and a the friend that arrived at Asseff's residence to give Thomas and her future husband a ride. George Asseff did not notice the conditions of Thomas as testified to by these two witnesses, one the future husband of Thomas and one a close friend of Thomas, and certainly the testimony as proffered of George Asseff should be given greater credibility that that of the witnesses for Thomas.

Morris does not have to point out to the Court that it takes two persons to make a conversation; that a person does not have to answer the phone when the caller is identified; that a person does not have to accept gifts, i.e. flowers, from a person no longer desired in their life; that a person does not have to go to dinner engagements with a person no longer desired in their life; that a person does not have to freely and voluntarily visit a person in the hospital on several occasions if that person is no longer desired in their life and furthermore a person desiring to end a relationship does not show up at the residence of the former partner that is no longer desired in the late hours and become upset and cause a scene at the said residence when the former partner is observed entertaining swimming guests.

In addition, Morris had a valid reason for being on his business property and Thomas knew of the habits of Morris to maintenance his business properties on Sunday evening and remove any monies in the change counters and on the 13th day of July, 2008, a Sunday, Morris did not even know Thomas was there until she went outside the trailer and allowed Morris to observe her presence.

Morris also desires to point out that he has conducted himself pursuant to the Emergency Temporary Order originally entered by Magistrate Yeager and further set forth in the Transfer Order entered by Judge Charnock on the 8th day of August, 2008, and until this day and there have been no allegations of violation of the terms and conditions of the Emergency Protective Order by Morris by any person or party.

ARGUMENT A (B IN PETITIONER'S BRIEF)

Thomas maintains that the Family Court of Clay County, West Virginia, and the Circuit Court of Clay County, West Virginia, applied the incorrect standard of review in determining whether the Domestic Violence Protective Order should have been granted to Thomas. The Family Court of Clay County, West Virginia, made determinations on two (2) occasions that the evidence presented by Thomas to the Court did not support an award of the Domestic Violence Protective Order. Neither the Family Court of Clay County, West Virginia, nor the Circuit Court of Clay County, West Virginia, in making determinations related to this case, abused their discretion in arriving at their ultimate conclusions.

The mere fact that Counsel for Thomas disagrees with the decisions of these bodies does not make those decisions incorrect. Both of the Courts hearing the evidence and/or arguments determined that the evidence presented by Thomas did not rise to the level of conduct for which a Domestic Violence Protective Order should be granted.

The Family Court of Clay County, West Virginia and the Circuit Court of Clay County, West Virginia determined that the legislative intent of the statute upon which Thomas relies had not been proven by evidence presented by Thomas and in the case of *State v. General Daniel Morgan Post No. 548, V.F.W., 144 W. Va. 137, 145, 107 S.E. 2d 353, 358 (1959)* later set forth and quoted in *Arbaugh v. Board of Education of Pendleton County, 214 W. Va. 677, 683, 591 S. E. 2d 235, 242 (2003)* this Court stated

“ [i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten[.]’ ” Chief Judge of the Circuit Court of Clay County, West Virginia, Richard A. Facemire, made the correct determination when he stated in his Order of January 13, 2009, that “while the Respondent’s behavior was less than ideal, it did not rise to the level of domestic violence, because *West Virginia Code 48-27-202 (5)* “contemplates more aggressive and direct action.” Taking into consideration the long-term former relationship, the conduct of both parties between May 19, 2008, and July 13, 2008, as well as the actions and conduct of the parties up to and including August 1, 2008, some twenty (20) days after the incident at the Thomas mobile home, the determinations and decisions of the Family Court of Clay County, West Virginia, and the Circuit Court of Clay County, West Virginia, were totally correct.

ARGUMENT B (C IN PETITIONER'S BRIEF)

The evidence presented to the Family Court of Clay County, West Virginia on two occasions by Thomas did not rise to the level for the award of a Domestic Violence Protective Order and this includes that fact that after listening to the evidence presented by the parties the Family Court of Clay County, West Virginia, was not convinced that the conduct of Morris restrained Thomas in any manner and that the said Thomas was free to leave the premises at any time and in fact did leave the premises and state to the independent witness, George Asseff, that "she locked her keys in her car and needed to call a friend". Thomas did not call any law enforcement persons even though she had resided in the area for a considerable period of time and was acquainted with the persons in the various law enforcement agencies. In addition, the Court should consider that there were no acts of domestic violence alleged in the Petition by Thomas except the one incident on the 13th day of July, 2008. In fact, there was not any testimony that Morris had any access to the mobile home of Thomas on the evening in question or at any other time from the end of December, 2007 until today.

All of the impartial testimony and exhibits placed into evidence by Morris, i.e. former Sheriff Fields, Asseff and photos of the door, do not support the testimony or the sworn allegations of Thomas that Morris in any way restrained her actions or did any act which subject Thomas to fear for her safety and/or well-being. The photos show no damage to the door and this alone allows one to conclude that the testimony of Thomas was not truthful. The Counsel for Thomas quotes from the case of *State v. Hanna* 378 S.E. 2d 640, 646 (W. Va. 1989) regarding a manner in which reasonable fear of harm or injury should be viewed; however, Counsel for Thomas fails to point out that in the

paragraph following his quoted text the case points out in Paragraph [7] “Here, the defendant had a history of violent behavior, of which Leslie was well aware, ...”. In the case at hand there is not one bit of evidence that Morris exhibited a violent nature during the previous relationship or from May 19, 2008, until July 13, 2008, nor is there any record evidence that Morris ever in his lifetime exhibited any violent nature. In fact, just the opposite is true.

All of the other propositions put forth by Counsel for Thomas are certainly not supported by any of the testimony offered by any witness at any hearing before the Family Court of Clay County, West Virginia. Only Thomas and her future husband testified of any threat and in fact the testimony of the future husband of Thomas was only supportive of Thomas as to her physical and emotional state, both of which is questionable taking into consideration the actions of Thomas after leaving the mobile home. That includes not seeking assistance from Asseff, not contacting law enforcement, not seeking medical assistance and waiting twenty (20) days to go to the Magistrate in Kanawha County, West Virginia to try to seek a Domestic Violence Protective Order for acts which happened in Clay County, West Virginia.

Counsel for Thomas makes an effort to place Morris in the category of a stalker. All of the voluntary actions of Thomas do not support this attempt to demean Morris in the eyes of the Court. Thomas, a well paid employee of the State of West Virginia, has been involved in Court actions in the past and is certainly familiar enough with the Court system to seek relief if she in fact thought Morris was a stalker.

Again, this Court should see that there is only one incident involved in this case notwithstanding attempts of Counsel for Thomas to try and indicate that there were multiple times Morris acted as alleged by Thomas on the 13th day of July, 2008.

ARGUMENT C (D IN PETITIONER'S BRIEF)

The Circuit Court of Clay County, West Virginia, after reviewing the decisions of two prior Family Court decisions, after considering the Two (2) Petitions for Appeal in this matter, and after reviewing the hearings as set forth on the recording devises utilized by Family Court arrived at the correct decision that the actions of Morris did not “create fear of physical harm by harassment, psychological abuse, or threatening acts,” and that there was “no evidence that the Respondent ever threatened the Petitioner with physical harm during this time that would lead the Petitioner to reasonably believe the Respondent was threatening her with physical harm on July 13, 2008.”

The testimony of the parties and the actions of the parties during their long term relationship and during the period of time in which Morris tried to “rekindle” the relationship, taking into consideration all of the actions of the parties especially the period of time from May 19, 2008, until July 13, 2008 can only lead one to the conclusion that the self-serving testimony of Thomas, supported by her future husband as to his observations, even though said observations are different from the observations of impartial witnesses, Asseff and former Sheriff Fields, do not allow an observer to come to the conclusion that Thomas was in fear; a fear of such an extent that led her to seek help from the Court twenty (20) days after the incident.

The Court considered whether the fears of Thomas were reasonable and on two (2) occasions found that the evidence did not support such a finding. The second paragraph on Petitioner's Brief on Page 17 is just not supported by the evidence. There was no stalking. There was no gun. There was no blocking of the driveway. There was no blocking escape because Thomas was able to vacate the mobile home. There was no 2 hours of banging on locked doors. There were many occasions prior to July 13, 2008, that both parties engaged in friendly contact, that is to say, it takes two persons to talk on the phone; it takes voluntary acts by Thomas to accept the gifts and dinners from Morris; it takes voluntary acts by Thomas to visit Morris in the hospital on at least three (3) occasions between May 19, 2008, and July 13, 2008, and it certainly was a voluntarily act of Thomas to show up to the residence of Morris on Friday, July 11, 2008, in the nighttime alone and uninvited (perhaps it was because Thomas did not want Morris to talk about the previous Friday night scene, this being the night of July 11, 2008, in the presence of Thomas' future husband, an individual Morris did not even know was in the mobile home on the 13th day of July, 2008) and cause a scene when she observed Morris entertaining friends in his pool. Therefore, this part of Petitioner's brief should be considered in the same light as the various case law cited by counsel in the brief lodged with this Court, as none of the case law cited relate to a person without any prior criminal or domestic violence history, and the same should be rejected by this Court.

The Family Court of Clay County, West Virginia concluded on two (2) separate occasions and the Circuit Court of Clay County, West Virginia upheld the decision of the Family Court that the conduct of Morris did not rise to the level that required the issuance of a Domestic Violence Protective Order.

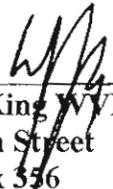
CONCLUSION

Joseph B. Morris prays that the Order of the Circuit Court of Clay County, West Virginia, dated the 13th day of January, 2009, entered by the Honorable Richard A. Facemire, Chief Judge of the Circuit Court of Clay County, West Virginia, this being the Order from the Second Appeal of Kimberly Thomas, be **RATIFIED AND CONFIRMED** and that the said Joseph B. Morris be *discharged from the terms and conditions of the Emergency Protective Order* issued by the Magistrate Court of Kanawha County, West Virginia, on the 1st day of August, 2008, and maintained by the Family Court of Clay County, West Virginia, through the two appeal periods of Kimberly Thomas and continued in effect by the Circuit Court of Clay County, West Virginia, during the period of appeal to this Honorable Court.

JOSEPH B. MORRIS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing

RESPONDENT/APPELLEE'S BRIEF IN RESPONSE TO

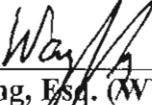
PETITIONER/APPELLANT'S BRIEF IN SUPPORT OF APPEAL was served by

counsel for the Respondent upon Counsel for the Petitioner in person at the Office

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