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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AJR, INC., a West Virginia corporation,
and JOHN M. RHODES,

Appellants,

v. **DOCKET NO. 34748**

DANNY L. BENSON,

Appellee.

FROM THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 99-C-105

APPELLANTS' REPLY BRIEF

FILED
AUG 21 2009
RORY L. PERRY, II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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I. INTRODUCTION

The arguments raised in the Response Brief filed by Plaintiff-Appellee Danny Benson ("Appellee") are in direct contravention of the law of West Virginia and stand in sharp contrast to the factual record of this proceeding.

The Appellee contends that in Benson v. AJR, Inc., 215 W. Va. 324, 599 S.E.2d 747 (2004) ("Benson I"), this Court ruled not only on the matters actually on appeal, but also on the viability of the Appellants' affirmative defense of material breach and all possible legal defenses. According to the Appellee's argument, this Court rejected all defenses and created the "law of the case" dependent on a single, isolated factual question. This is simply not accurate – the Benson I Court did not unilaterally extinguish the Appellants' defenses. The issue of material breach was neither addressed by the Circuit Court nor appealed by the Appellee in Benson I, and thus was never previously before this Court.

Simply put, this Court ruled only on what was before it, and not on the universe of possible defenses preserved for a trial by jury. This Court's decision remanding the case, stating that the reason for the Appellee's termination was "a factual issue" to be decided by a jury, implicitly mandated the resolution of all factual and legal issues surrounding the Appellee's breach of contract claim, including whether the Appellee was in material breach prior to his termination.

In his response brief, and for the first time since the jury rendered the General Verdict in 2005, the Appellee claims that the General Verdict is unsupported by law or evidence (it was clearly supported by both),[1] yet the Appellee's failure to challenge the sufficiency of the

[1] The Appellee inexplicably limits his review of cases decided by this Court, dealing with breach of contract, to those cases decided since January 1, 1970.

evidence before the Circuit Court constitutes waiver, and the Appellants' theory of material breach is supported by well-settled principles of contract law decided by this Court.

The Appellee directs the Court's attention to whether the Appellee's discharge deviated from the contracted-for methods of termination, however the real issue before the Court is whether the Appellee materially breached his employment contract as found by the jury. In other words, was the Appellee's employment contract, and thereby the liquidated damages provision, even *in effect* at the time of discharge as a result of the Appellee's material breach?

It is clear from even the most cursory review of the record in this case, coupled with a basic understanding of the relevant legal principles, that the Circuit Court's Order awarding the Appellee damages on a claim he lost at trial constitutes reversible error. Accordingly, and as discussed more fully herein, the July 28, 2008 Order entered by the Circuit Court awarding the Appellee damages on his breach of contract claim should be reversed and the Circuit Court directed to enter final judgment in favor of the Appellants.

II. POINTS AND DISCUSSION OF THE LAW

1. The issue of material breach was never decided by the Circuit Court of Wood County and thus never before this Court in Benson I.

Nowhere in the Appellee's Response Brief has the Appellee contended that the issue of material breach was before this Court in Benson I. Nor could he, because the Circuit Court expressly declined to address that issue when it found that its other rulings on summary judgment rendered the issue of material breach moot. Instead, the Appellee has adopted the legally indefensible position that this Court elected to overrule decades of jurisprudence and exercise original jurisdiction to pass on the availability of the defense of material breach, and thereafter somehow instructed the Circuit Court to foreclose the assertion of that defense on

remand. See Appellee Danny L. Benson's Response to Appellants' Brief ("Response Brief") at 3. The Appellee's position, inexplicably adopted in full by the Circuit Court in 2008, three years ***after*** the jury trial, is divorced from the legal and factual basis surrounding the original appeal in Benson I, contrary to established authority governing appellate review in West Virginia and incorrect as a matter of law.[2]

A. This Court did not rule on an issue that was not decided by the Circuit Court of Wood County in the first instance.

It is uncontroverted that this Court did not specifically rule on the issue of material breach in Benson I. Despite this Court's limited appellate jurisdiction, the Appellee contends, without any citation to supporting authority, that the Benson I Court was somehow nevertheless empowered to and did strip the Appellants of their constitutionally guaranteed right to put on a defense,[3] a conclusion that by implication overrules decades of appellate jurisprudence.

The most basic tenets of law governing appellate review in West Virginia mandate that the Supreme Court of Appeals of West Virginia does "not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court." Syl. Pt. 3, Dean v. West Virginia Dept. Motor Vehicles, 195 W. Va. 70, 464 S.E.2d 589 (1995). Indeed, this Court has repeatedly said "[we] will not review or reverse a decree or order of the circuit court, or any part thereof, not appealed from." Hupp v. Sasser, 200 W. Va. 791, 800, 490 S.E.2d 880, 889 (1997) (quoting Sulzberger & Sons Co. v. Fairmont Packing Co., 86 W. Va. 361, 103 S.E. 121 (1920));

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[2] Syl. Pt. 4 (in part), State ex rel. Frazier v. Cummings, 214 W. Va. 802, 591 S.E.2d 728 (2003) (holding "[a] circuit court's interpretation of a mandate of this Court . . . [is a] questio[n] of law . . . reviewed *de novo*").

[3] See Catlett v. MacQueen, 180 W. Va. 6, 11, 375 S.E.2d 184, 189 (1988) (recognizing that "where conflicting theories of a case are presented by the evidence, each party is entitled to have his view of the case presented to the jury . . ."); See also Segal v. Beard, 181 W. Va. 92, 100, 380 S.E.2d 444, 452 (1989) (quoting Goss v. Lopez, 419 U.S. 565, 579 (1975)) (recognizing that "[a] fundamental element of 'due process of law' is an opportunity to be heard, . . . and an opportunity to be heard . . . has little reality unless one . . . can choose for himself [or herself] whether to . . . contest"). See also U.S. Const. amend XIV, § 1 ("No state shall . . . deprive any person of . . . property without due process of law . . ."); W. Va. Const. art. III, § 10 ("No person shall be deprived of . . . property, without due process of law, and the judgment of his peers").

See Korzun v. Shahan, 151 W. Va. 243, 254, 151 S.E.2d 287, 294 (1996) (quoting Syl. Pt., In re: Estate of Amanda Nicholas, 142 W.Va. 80, 94 S.E.2d 452 (1956)) (holding that "[t]his Court on writ of error or appeal, in the first instance, will not entertain and decide a nonjurisdictional question not passed on by the circuit court").

That the issue of material breach was not before the Benson I Court is not in dispute. The issue of material breach was neither ruled on by the Circuit Court nor before this Court during the Appellee's subsequent appeal because the Circuit Court expressly abstained from ruling on the issue of material breach, deeming the issue moot in light of the Circuit Court's other holdings:

> Defendants also claimed, as a defense to Plaintiff's Motion for Summary Judgment, that Plaintiff may not recover for breach of contract because he materially breached his employment contract. Defendants claim that resolution of whether Plaintiff's breach is material is an issue for the jury which cannot be resolved on summary judgment. Milner Hotels, Inc. v. Norfolk Western Ry. Co., 822 F. Supp. 341, 345 (S.D. W. Va. 1993), aff'd 19 F.3d 1439 (4th Cir. 1994). **Because this Court's other holdings render this issue moot, the Court does not address Defendants' breach of contract defense to Plaintiff's Motion for Summary Judgment.**

See Findings of Fact and Conclusions of Law, at p.4 n.2 (emphasis added).[4]

The Circuit Court refrained from ruling on the validity of the Appellants' defense of material breach. The issue was not before the Benson I Court. This Court was not even asked to, let alone presented with the opportunity to, address the viability of the defense of material breach, an issue of fact that is squarely within the province of the jury. See Milner Hotels, Inc. v.

[4] While both parties moved for summary judgment, the Appellee herein (the Appellant in Benson I, Danny L. Benson) only appealed the grant of the Appellants' herein (and Appellees' in Benson I, AJR, Inc. and Mr. Rhodes') motion for summary judgment on Benson's invasion of privacy and breach of contract claims. The Appellee herein, Benson, never appealed the Circuit Court's denial of his motion for summary judgment.

Norfolk Western Ry. Co., 822 F. Supp. 341, 345 (S.D.W.Va. 1993) (recognizing that "whether a breach is a material one is a question of fact for the jury").

The legal and the factual record in this case is clear and weighs in favor of the Appellants. The Court should decline the Appellee's invitation to engage in the wholesale abandonment of established authority governing appellate review in West Virginia and reverse the Circuit Court's Order.

B. The law of the case doctrine did not bar the Appellants' trial defense of material breach.

The Appellee's contention that the "law of the case" doctrine barred the defense of material breach is flawed. Under the law of the case doctrine, "[t]he decree of [this Court], **upon a question decided by the trial court** is final, and the questions involved and adjudicated on a former appeal generally cannot be reviewed on the second appeal." Syl. Pt. 1 (in part), Highland v. Davis, 121 W. Va. 524, 6 S.E.2d 922 (1939) (emphasis added); see Frazier, 214 W. Va. at 806, 591 S.E.2d at 734. Indeed, by its very nature, the law of the case doctrine requires that a "question has been definitively determined by" the Supreme Court of Appeals. Syl. Pt. 3 (in part), Phares v. Brooks, 214 W. Va. 442, 590 S.E.2d 370 (2003).

The only issues definitively determined by the Benson I Court were that (i) the Appellee's invasion of privacy claim was barred as a matter of law, and (ii) summary judgment on the Appellee's breach of contract claim was precluded by material issues of fact. Benson I, 215 W. Va. at 325, 599 S.E.2d at 748. At no point in its decision did the Benson I Court address, let alone resolve, the issue of the Appellee's material breach of contract as a defense, an omission owing to the fact that the issue was never appealed by the Appellee or otherwise brought before the Court. The law of the case doctrine is inapplicable.

C. The scope of the Benson I Court's remand did not bar the Appellants' defense of material breach.

The proposition that the Court's remand foreclosed the assertion of affirmative defenses during trial is equally unavailing. The Court's decision remanding the case for trial, predicated upon the existence of disputed material facts which rendered summary disposition inappropriate, did not foreclose the Appellants from asserting the defense of material breach or mandate the summary disposition of the Appellants' defenses.

The proposition that Benson I intended to foreclose the defense of material breach on remand is belied by the letter and the spirit of this Court's decision. By its very nature, the decision remanding the case spoke only to the fact that the breach of contract claim was not suitable for disposition on summary judgment because of the existence of disputed material facts. Indeed, the Benson I Court recognized as much, stating that "**a factual issue** that must be determined **for purposes of ascertaining whether AJR was required under the terms of the contract** . . . is the reason upon which AJR relied in terminating Mr. Benson's employment." Id. at 328, 599 S.E.2d at 751 (emphasis added).

Benson I, in context, addressed a classic summary judgment appeal. The Appellee's claims had been adjudicated as a matter of law and no trial had been held. The Benson I Court's specification of one factual issue that required determination by a jury – the reason for the Appellee's termination – was by no means to the exclusion of all other factual issues, but simply articulated the existence of a factual issue which precluded summary judgment.

Contrary to representations made in the Appellee's Response Brief, at no point did the Benson I Court recognize a "sole factual issue" to be resolved on remand. Nor did it otherwise limit the issues to be decided at trial in such a manner as to preclude the assertion of the Appellants' affirmative defense. The Court's deliberate language choice – "a factual issue," as

opposed to "the sole factual issue" – recognized that on remand all factual issues not yet heard by a jury, among them the reason for the Appellee's termination as well as many others – including whether the Appellee had materially breached his contract – would be resolved.[5] Id. Indeed, it is well established that "whether a breach is a material one is **a question of fact for the jury**." Milner Hotels, 822 F. Supp. at 345. See also Malik Corp. v. Tenacity Group, LLC, 961 A.2d 1057, 1061 (D.C. Cir. 2008) (recognizing that "whether a breach of contract is 'material' is an issue of fact, and such questions are the sort we properly rely on juries to decide"); Prozinski v. Northeast Real Estate Service, LLC, 59 Mass. App. Ct. 599, 609, 797 N.E.2d 415, 423 (2003) (stating that "whether a breach is material . . . normally is a question for the jury to decide").

The scope of the remand advocated for by the Appellee – one that unilaterally resolves issues that were never before the issuing court and that effectively and unconstitutionally strips a defendant of the ability to put on a defense – should be rejected by the Court.

2. Appellants are entitled to final judgment on the General Verdict in their favor.

In his Response Brief, the Appellee, for the first time, attacks the legal and factual basis for the General Verdict finding him in material breach. The Appellee's challenges, however, were waived at the trial court level and are without merit. Additionally, established contract law in West Virginia supports the conclusion that the jury's finding that the Appellee had materially breached his contract prior to his date of termination excused the Appellants from future performance of or liability under the Appellee's employment contract.

[5] In assessing the scope of an order of remand, this Court has previously recognized that "a court must look to the entire mandate, examining every part of the opinion to determine if a remand is general or limited, as the relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language." Frazier, 214 W. Va. at 809, 591 S.E.2d at 735. Clearly, the Appellee has attempted to manufacture "certain key identifiable language" where none would otherwise exist in order to support his baseless claim that the Appellants were foreclosed from asserting the defense of material breach on remand.

A. Any challenge to the sufficiency of the evidence supporting the General Verdict has been waived.

In his Response Brief, the Appellee, for the first time, attacks the factual basis for the General Verdict finding him in material breach. Yet, at the close of evidence, the Appellee failed to move, under Rule 50 of the West Virginia Rules of Civil Procedure, for judgment as a matter of law before the case was submitted to the jury. Any challenge to the sufficiency of the evidence to support the General Verdict was waived in 2005. See Chambers v. Smith, 157 W. Va. 77, 81, 198 S.E.2d 806, 809 (1973) (recognizing that "the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court"); see also Litigation Handbook on West Virginia Rules of Civil Procedure, Franklin D. Cleckley at 1026 (3d ed. 2008) (stating that "[a]s a general rule, a party that fails to renew a motion for judgment as a matter of law at the conclusion of all the evidence, waives its right to challenge the sufficiency of the evidence on appeal").[6]

The Appellee has attempted to dismiss the legal significance of the General Verdict by contending that the General Verdict was actually one in a set of Special Interrogatories submitted to the jury. The novelty of the Appellee's argument – that a General Verdict is not actually a General Verdict but is really a Special Interrogatory – is undermined by the Appellee's own Response Brief, wherein he is bound by the record to distinguish between the two forms submitted to the jury and call them what they really are: the "**GENERAL VERDICT**" and the

[6] The Appellee's challenge to the sufficiency of the evidence is nevertheless baseless. The record is replete with direct evidence, including admissions by the Appellee, which support the jury's finding by General Verdict that the Appellee materially breached his contract: (i) as a supervisor, the Appellee was responsible for enforcing the Appellants' drug-free workplace policy (Trial Tr. at 155:23-156:14, 171:7-172:11); (ii) the Appellee was required to lead by example, specifically with respect to the Appellants' drug-free workplace policy, and set a good work ethic (Id. at 157:16-161:19, 171:7-172:11, 174:14-175:8); (iii) the Appellee executed his employment contract after he had a clear understanding of his job duties, including enforcing the drug-free workplace (Id. at 157:16-161:19, 171:7-172:11); (iv) the Appellee was fully aware he was required to perform his job duties under the contract in good faith (Id. at 157:16-161:19); and (v) the Appellee intentionally violated the Appellants' drug-free workplace policy by reporting to work with a level of cocaine in his system more than three times that established by the United States Department of Transportation to determine use and impairment (Id. at 142:7-21, 175:9-176:3).

"**SPECIAL INTERROGATORIES**." See Response Brief at 8. Indeed, the Appellee's thinly veiled attempt to obviate the significance of the General Verdict only reinforces the fact that the General Verdict, finding the Appellee in material breach, excused the Appellants from the contract:

> We, the jury, find by a preponderance of the evidence in this case that the **Plaintiff Danny L. Benson materially breached the terms of the employment contract and find in favor of the Defendants AJR, Inc. and John M. Rhodes** and against the Plaintiff Danny L. Benson.

See Verdict Form (emphasis added).

B. The jury's finding that the Appellee materially breached his employment contract excused the Appellants from future performance of the contract and precluded recovery under the liquidated damages provision by the Appellee.

The General Verdict, finding that the Appellee materially breached his employment contract *prior* to the termination of the Appellee's employment, excused the Appellants from future performance of that same contract and precludes recovery by the Appellee under the liquidated damages provision. In his Response Brief, the Appellee, somewhat mysteriously, limits his review of contract cases involving material breach to those decided since January 1970. The Appellee posits no explanation for his arbitrary selection of the eight cases referenced in his Response Brief.[7] Yet, based on his limited review, the Appellee concludes that material breach is an amorphous legal concept with marginal treatment by West Virginia courts. Nothing could be further from the truth, as material breach is a well settled, hornbook principle of law that has extensive treatment by this Court. Indeed, existing authority in West Virginia clearly establishes that the Appellee's material breach, as found from competent evidence by a jury of his peers, excused the Appellants from the contract.

[7] See Response Brief at 13.

It is well established in West Virginia that a material breach of contract will excuse the non-breaching party from future performance. See Emerson Shoe Co. v. Neely, 99 W. Va. 657, 129 S.E. 718, 718 (1925) (noting the general rule that "a party is not excused by the other party's breach of contract unless the breach is material or essential"). To that end, "whether a breach is a material one is **a question of fact for the jury** . . . [and] [f]or [a plaintiff] to be barred from recovery of damages by its own breach, the plaintiff's breach must be material." Milner Hotels, 822 F. Supp. at 345 (emphasis added). Indeed, "[w]here the plaintiff claims damages for the breach of a contract, it is necessary to a recovery that he show that he has complied with the contract himself, . . . and, if the evidence shows that he has not complied with the terms of the contract, . . . he will be denied a recovery from the breach of same." Syl. Pt., Jones v. Kessler, 98 W. Va. 1, 126 S.E. 344 (1925).

Indeed, "[t]he rule is strict and inflexible that **a plaintiff has no right of action for damages for breach of contract, where he himself has breached the contract.**" Jones, 98 W. Va. 1, 126 S.E. at 350 (emphasis added); See Franklin v. Pence, 128 W. Va. 353, 357, 36 S.E.2d 505, 508 (1945) (internal citations omitted) (stating that "[i]f [the plaintiffs' actions] constituted a breach of the contract upon [his] part, [he] can not maintain [an] action for damages resulting from the breach of the contract upon the part of the defendant"); see Wood County Airport Authority v. Crown Airways, Inc., 919 F. Supp. 960, 968 (S.D.W.Va. 1996) (recognizing "[a] party's failure to perform its own obligations precludes recovery against another party for breach of contract").

Clearly, the jury found, as articulated by the General Verdict, that the Appellee materially breached his employment contract prior to his date of termination.[8] Such a finding did not, as

[8] During trial, counsel for the Appellee only lodged a general objection to evidence of the defense of material breach, claiming the Benson I Court had limited the issue on remand to whether the Appellee's termination was for

contended by the Appellee, permit "the Circuit Court to determine . . . the legal significance of the jury's factual determinations in response to the special interrogatories," because, as discussed above, the controlling General Verdict was not a Special Interrogatory. See Response Brief at 2. Instead, the jury's finding that the Appellee had materially breached his employment contract excused the Appellants, as a matter of law, from future performance of the employment contract, and by implication obviated the restrictions on the agreed upon mode of termination by rendering the Appellee an at-will employee. W. Va. Human Rights Comm'n v. Smoot Coal Co., Inc., 186 W. Va. 348, 353, 412 S.E.2d 749, 754 (1991); J.W. Ellison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S.E. 391, 394. The Circuit Court initially recognized as much, entering an order (drafted entirely by counsel for the Appellee) that recorded the General Verdict "in favor of the Defendants and against Plaintiff on the issue of material breach submitted to the jury on the general verdict form." See Order Entering Judgment.

In his Response Brief, the Appellee claims that reversing the Circuit Court will eviscerate the concept of at-will employment. See Response Brief at 2-3. This argument, however, mischaracterizes the issues before the Court and is a creative, albeit futile, attempt to reshape the issues. The precise issue before the Court is not the manner by which the Appellee was terminated, but whether at the time of his termination the employment contract was *still in effect* – thereby permitting the Appellee to avail himself of the liquidated damages provision – or whether the Appellee was in *material breach*, a conclusion that excuses the Appellants from the

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dishonesty or drug use. At no point, however, did the Appellee object to the General Verdict form or Special Interrogatories submitted to the jury, nor did the Appellee oppose the jury instructions on material breach or the Appellee's duty to perform the employment contract in good faith.

contract, Emerson, 99 W. Va. at 657, 129 S.E. at 719, relegates the Appellee to at-will status and precludes him from recovering under the contract. Jones, 98 W. Va. 1, 126 S.E. at 508.[9]

Had the Appellee honored the terms of his employment contract, which the jury found he failed to do, it is undisputed that the contract, including the liquidated damages provision, would have remained in effect. However, a finding that the Appellee was in material breach foreclosed *any* recovery under the terms of the contract, including the liquidated damages provision, regardless of whether the Appellee's discharge following his breach deviated from the contracted-for methods of termination because the contract was of no effect. W. Va. Human Right Comm'n, 186 W. Va. at 353, 412 S.E.2d at 754; Franklin, 128 W. Va. at 357, 36 S.E.2d at 508; Wood County, 919 F. Supp. at 968.

The Appellee's attempts to obfuscate the application of the material breach doctrine by focusing on the perceived effect the doctrine *might have* on at-will employment relationships, rather than the effect that the doctrine *does have* on a contract bargained for in good faith, is superficial at best.[10] The jury's General Verdict – that the Appellee materially breached his employment contract prior to his discharge – relieved the Appellants of their outstanding contractual obligations and rendered the Appellee an at-will employee without the contracted for benefits and protections to which he otherwise would have been entitled, including the liquidated damages provision, had he honored the contract.

As the jury's finding by General Verdict that the Appellee materially breached his employment contract prior to his termination excused the Appellants from future performance

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[9] Indeed, "[i]t is fundamental in the law of contracts that where a person has failed to perform an act which is a condition precedent to the assertion of a right to which he may have been entitled had he performed such act, he is not entitled to the benefit of the promise for which the omitted act was of the essence of the consideration for such promise." Shank v. Jefferson Standard Life Ins. Co., 128 W. Va. 435, 446-47, 36 S.E.2d 897, 903 (1946).

[10] The Appellee's argument is not even well taken, as a finding of material breach of a written employment contract, as occurred in the instant case, triggers the at-will employment doctrine, rather than hinders it, and the principles of at-will employment govern the remainder of the employment relationship.

and precluded the Appellee, as a matter of law, from recovering under the contract's liquidated damages provision, the Court should reverse the Circuit Court's July 28, 2008 Order.

III. CONCLUSION

For the reasons stated herein, and such further reasons contained in the Appellants' Appellate Brief, Appellants John M. Rhodes and AJR, Inc., respectfully request that the Court enter an Order reversing the July 28, 2008 Order entered by the Circuit Court of Wood County and compelling the Circuit Court to enter final judgment in favor of the Appellants that is consistent with the General Verdict.

IV. RELIEF PRAYED FOR

For the foregoing reasons, Appellants AJR, Inc., and John M. Rhodes respectfully request that the Supreme Court of Appeals of West Virginia reverse the July 28, 2008 order entered by the Circuit Court of Wood County and direct the Circuit Court to enter a final judgment order in favor of Appellants.

Respectfully Submitted,

AJR, INC., and
JOHN M. RHODES

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Dated: August 21, 2009

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AJR, INC., a West Virginia corporation,
and JOHN M. RHODES,

Appellants,

v. **DOCKET NO. 34748**

DANNY L. BENSON,

Appellee.

CERTIFICATE OF SERVICE

I, Niall A. Paul, hereby certify that service of the foregoing "**Appellants' Reply Brief**" has been made upon the Appellee by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid, on this 21st day of August, 2009, addressed as follows:

Walt Auvil, Esquire
Rusen & Auvil, PLLC
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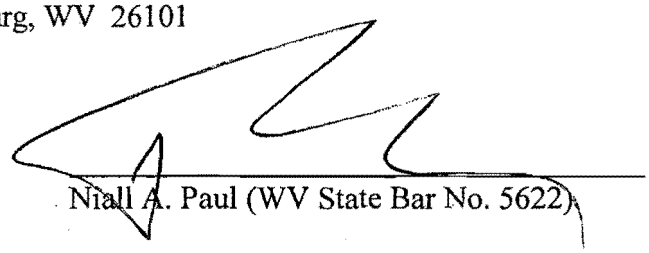
Parkersburg, WV 26101



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