

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

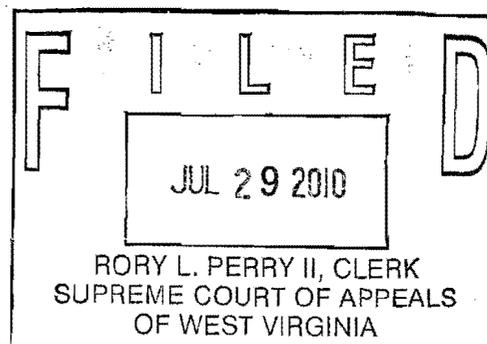
HERB JONKERS,
LOUIS B. ATHEY, and
EUGENE CAPRIOTTI,
Appellants,

v.

Appeal No. 35650

TODD BALDAU
Appellee.

BRIEF OF APPELLANTS



Submitted by:

James P. Campbell, Esq. (WVSB 609)
J. Michael Cassell, Esq. (WVSB 670)
201 N. George Street, 2nd Floor
Charles Town, West Virginia 25414
304-725-5325/telephone
304-724-8009/facsimile

TABLE OF CONTENTS

Table of Authorities	iii
I. Kind of Proceeding and Nature of Ruling in the Lower Tribunal	1
II. Statement of Facts.....	3
III. Assignments of Error	8
IV. Summary of the Argument.....	8
V. Argument	11
A. <i>Noerr-Pennington</i> Immunity is Not Limited to Defamation Actions and Applies to Petitioners' Removal Petition	11
1. Constitutional Protection of Petitioning Activity Extends to the Judicial Process	11
2. <i>Noerr-Pennington</i> Doctrine	12
3. Test for Subjectively Reasonable Litigation Shows that the Circuit Court Erred by Denying Petitioners' Cross Motion for Summary Judgment	15
4. West Virginia Courts Have Not Limited <i>Noerr-Pennington</i> Immunity to Defamation Actions	16
5. <i>Noerr-Pennington</i> Presumptively Applies Whenever Petitioning Activity is Involved; Therefore, Petitioners Did Not Waive Immunity	18
B. The Circuit Court's Denial of Petitioners' Motion to Amend to Add <i>Noerr-Pennington</i> as a Defense was Erroneous	19
C. The Circuit Court's Award of Partial Summary Judgment was Erroneous	23
1. The Three Judge Panel's Decision Did Not Bar Litigation of Probable Cause and Malice Under the Doctrines of <i>Res Judicata</i> or Collateral Estoppel.....	23

2.	The Record clearly shows probable cause for filing the Removal Petitioner	
3.	The Circuit Court Erred in Finding that the Petitioners' Removal Petition Lacked Probable Cause Based Solely Upon the Three Judge Panel's Decision	29
4.	The Circuit Court Erred by Inferring Malice from Lack of Probable Cause Based Solely on the Three Judge Panel's Decision.....	30
D.	Damages Awards Were Erroneous	31
1.	There is No Basis in Law for Damages in Malicious Prosecution Cases for " <i>Mental Anguish, Upset, Annoyance and Inconvenience</i> "	31
2.	Punitive Damages Award was Error.....	33
3.	Award of Attorneys Fees was Abuse of Discretion.....	34
VI.	Conclusion	35
VII.	Relief Sought and Request for Oral Argument.....	37
VIII.	Request for Oral Argument.....	38
	Certificate of Service	38

TABLE OF AUTHORITIES

Cases

<i>Allied Tube and Conduit Corp. v. Indian Head, Inc.</i> , 486 U.S. 492 (1988).....	14
<i>Bayou Fleet, Inc. v. Alexander</i> , 234 F.3d 852 (5 th Cir. 2000).....	18, 22
<i>Beto v. Stewart</i> , 213 W.Va. 355, 582 S.E.2d 802 (2003)	34
<i>Blethen v. West Virginia Dept. of Revenue/State Tax Dept.</i> , 219 W.Va. 402, 633 S.E.2d 531 (2006).....	23
<i>Bowyer v. Hi-Lad Inc.</i> , 216 W.Va. 634, 609 S.E.2d 895 (2004).....	34
<i>Cheminor Drugs, Ltd. v. Ethyl Corp.</i> , 168 F.3d 119, 128-29 (3d Cir. 1999)	12
<i>Cove Road Development v. Western Cranston Industrial Park Associates</i> , 674 A.2d 1234, 1237 (R.I. 1996).....	13, 15, 36
<i>Donnally v. Fairmont Brewing Co.</i> , 87 W.Va. 494, 105 S.E. 778 (1921).....	24
<i>Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961)	12
<i>Garnes v. Fleming Landfill Inc.</i> , 186 W.Va. 656, 413 S.E.2d 897 (1991)	33
<i>Harris v. Adkins</i> , 189 W.Va. 465, 432 S.E.2d 549 (1993)	11, 12, 15
<i>Horkulic v. Galloway</i> , 222 W.Va. 450, 665 S.E.2d 284 (2008)	24
<i>Hunter v. Beckley Newspapers Corp.</i> , 129 W.Va. 302, 40 S.E.2d 332 (1946)	26
<i>Igen International, Inc. v. Roche Diagnostics GMBH</i> , 335 F.3d 303 (4 th Cir. 2003).....	12, 18, 19
<i>Kaufman v. Planning and Zoning Commission of the City of Fairmont</i> , 171 W.Va. 174 (1982)	2
<i>Long v. Egnor</i> , 176 W.Va. 628, 346 S.E.2d 778 (1986).....	35

<i>McCammon v. Oldaker</i> , 205 W.Va. 24, 31, 516 S.E.2d 38, 45 (1999)	35
<i>McNunis v. Zukosky</i> , 141 W.Va. 145, 89 S.E.2d 354 (1955)	23
<i>Morton v. Chesapeake and Ohio Ry. Col.</i> , 184 W.Va. 64, 399 S.E.2d 464 (1990).....	25
<i>Nader v. The Democratic National Com.</i> , 555 F.Supp.2d 137 (D.D.C. 2008).....	12
<i>Nellas v. Loucas</i> , 156 W.Va. 77, 191 S.E.2d 160 (1972)	19
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964).....	12
<i>Otter Tail Power Co. v. U.S.</i> , 410 U.S. 366 (1973)	17
<i>Plumley v. Mockett</i> , 97 Cal.Rptr.3d 822 (Cal.App.2Dist. 2008)	26
<i>Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.</i> , 508 U.S. 49 (1993).....	13
<i>Radochio v. Katzen</i> , 92 W.Va. 340, 114 S.E. 746 (1922).....	24
<i>Rosier v. Garron, Inc.</i> , 156 W.Va. 861, 199 S.E.2d 50 (1973)	20
<i>Sally-Mike Properties v. Yokum</i> , 179 W.Va. 48, 365 S.E.2d 246 (1986).....	34
<i>Southern Ry. Co. v. Mosby</i> , 112 Va. 169, 70 S.E.2d 517 (1911).....	31
<i>State ex rel. Vedder v. Zakaib</i> , 217 W.Va. 528, 618 S.E.2d 537 (2005)	20
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	17
<i>Toler v. Cassinelli</i> , 129 W.Va. 591, 41 S.E.2d 672, 677 (1947)	32
<i>Truman v. Fidelity & Cas. Co. of N.Y.</i> , 146 W.Va. 707, 123 S.E.2d 59 (1961).....	21
<i>U.S. v. American Tel. ad Tel. Co.</i> , 524 F.Supp. 1336, 1364 (D.D.C. 1981).....	13, 14
<i>United Mine Workers of America v. Pennington</i> , 381 U.S. 657 (1965)	12
<i>United Mine Workers of America, District 12 v. Illinois State Bar Association</i> , 389 U.S. 217 (1967).....	17
<i>Vandevender v. Sheetz, Inc.</i> , 200 W.Va. 591, 490 S.E.2d 678 (1997).....	33, 34
<i>Vinal v. Core</i> 18 W.Va. 1 (1881).....	32

Walker v. Option One Mortgage Corp., 220 W.Va. 660, 649 S.E.2d 233 (2007)..... 20

Webb v. Fury, 167 W.Va. 434, 282 S.E.2d 28 (1981) 12, 16

West Virginia Human Rights Com'n v. Esquire Group, Inc.,
217 W.Va. 454, 618 S.E.2d 463 (2005)..... 23

Wright v. Lantz, 133 W.Va. 786, 58 S.E.2d 123 (1950)..... 30

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**HERB JONKERS,
LOUIS B. ATHEY, and
EUGENE CAPRIOTTI,**

Appellants,

Appeal No. _____

v.

TODD BALDAU,

Appellee.

Brief of the Appellant

COMES NOW, Appellants, Herb Jonkers, Louis B. Athey, and Eugene Capriotti, by counsel, and files this Brief of the Appellant, stating in support as follows:

**I. KIND OF PROCEEDING AND NATURE
OF RULING IN LOWER TRIBUNAL**

Herb Jonkers, Louis B. Athey and Eugene Capriotti are real estate developers in Jefferson County, West Virginia, who were three (3) of eighty (80) petitioners who sought the removal of the Appellee, Planning Commissioner Todd Baldau ("Baldau") from the Jefferson County Planning Commission pursuant to West Virginia Code Section 6-6-7. Jonkers, Athey and Capriotti shall be referred to herein as "Petitioners" to reflect their status in the underlying case and in this Petition for Appeal.

After the filing of the petition for removal (the "Removal Petition"), this Honorable Court appointed a three (3) judge panel, which denied a Motion to Dismiss filed by Baldau and declined to remove Baldau after a full day evidentiary hearing, concluding that the conduct about which Petitioners complained in a removal proceeding was not a basis for removal. The essence of the Removal Petition was that Baldau asserted that the Planning Commission had discretion to

deny applications that satisfied the Subdivision Ordinance requirements notwithstanding the mandate of *Kaufman v. Planning and Zoning Commission of the City of Fairmont*, 171 W.Va. 174 (1982) that Planning Commission duties are ministerial if an application for subdivision satisfies the ordinance requirements. The three judge panel also concluded that “*there is no clear and convincing evidence at all in this case which supports, to any degree, any factual or legal conclusion that the Respondent has, in any manner, in the performance of any of his duties as a member of the Planning Commission, committed multiple acts of official misconduct, engaged in malfeasance in office, is incompetent or has neglected any of his official duties.*”

Following the entry of the Order by the three judge panel, Baldau filed the instant action for malicious prosecution against only three (3) of the eighty (80) petitioners in the removal action, specifically Athey, Capriotti and Jonkers. Baldau subsequently filed a summary judgment motion asserting that the Order of the three judge panel established want of probable cause and malice should be inferred on this basis. Baldau also claimed that determination of the elements of malicious prosecution was barred by *res judicata* or collateral estoppel.

Your Petitioners challenged Baldau’s Summary Judgment Motion, maintaining that *res judicata* and collateral estoppel do not bar litigation of malicious prosecution on the merits; probable cause and malice were not established by the three judge panel’s ruling; and Petitioners’ participation in the removal action was subject to qualified immunity under the *Noerr-Pennington* Doctrine. The Circuit Court disagreed and granted summary judgment on the issue of liability for malicious prosecution, holding that the three judge panel’s ruling (i) conclusively demonstrated lack of probable cause and malice should be inferred as a matter of law; and (ii) constituted *res judicata* and collateral estoppel on the issues of probable cause and malice. The Circuit Court, now retired Thomas J. Steptoe, Jr. presiding, refused to apply the

Noerr-Pennington Doctrine because it had not been raised as an Affirmative Defense, and because this Court had not applied the doctrine to malicious prosecution cases and/or to petitioning activity under the Removal Statute, West Virginia Code Section 6-6-7.

The matter then proceeded to trial on the issue of damages only before the Honorable David Sanders, following Judge Steptoe's retirement. Your Petitioners sought reconsideration of the summary judgment ruling before Judge Sanders on the issues of probable cause, malice and qualified immunity, but Judge Sanders refused to revisit the decision made by Judge Steptoe. After being instructed that liability had been determined and that "malice has been inferred" by the court, the jury returned a verdict for \$7,700 in compensatory damages and \$15,000 in punitive damages against each Defendant. On February 24, 2010, the Circuit Court awarded Baldau \$58,576.25 in attorney fees and costs. This timely appeal follows.

II. STATEMENT OF FACTS

In order to understand the facts of this case, a review of the Removal Petition and the facts presented to the three judge panel is first necessary.¹ The Removal Petition pursuant to Section 6-6-7 was a nine paragraph pleading, which alleged in Paragraph 8 that Baldau "*committed multiple acts of official misconduct, malfeasance in office, incompetence and neglect of duty, each of which is a basis for removal . . .*" Paragraphs 8(a) through (l) specifically identified each alleged act of malfeasance:

- a. *Baldau has asserted that he and the Jefferson County Planning Commission have discretion to deny subdivision applications because they act with discretion, rather than in a ministerial capacity; and*
- b. *Baldau's assertion that the Jefferson County Planning Commission has discretion to deny subdivision applications, even if the same comply with the Jefferson County Subdivision and Zoning Ordinances is embodied as*

¹ The facts of this case necessitate that the record in the Removal Action, *Capriotti, et al. v. Baldau*, Civil Act No. 06-C-373, likewise be designated, so that this Court might fully consider the issues of *res judicata* and collateral estoppel.

follows (i) his vote to deny the Benview Subdivision application on June 28, 2005 as evidenced in the Minutes of said meeting and the audiotape of proceedings with regard to the same; and (ii) his vote to approve the August 12, 2005 decision of the Planning Commission denying the final plat approval for **Benview Subdivision**, which decision specifically alleges that the **Jefferson County Planning Commission is “not a ministerial body that is required to approve a final plat when all technical requirements and conditions of the Subdivision Ordinance have been met”**;

- c. Baldau's vote against the approval of the Thorn Hill Subdivision application on December 13, 2005 as evidenced in the Minutes of said meeting and the audiotape of proceedings with regard to the same;
- d. Baldau's approval and consent to the Office of the Jefferson County Prosecuting Attorney in *Thorn Hill v. Jefferson County Planning and Zoning Commission*, Case No. 05-C-372, wherein the Planning Commission asserted to the Circuit Court of Jefferson County that the **Planning Commission was not a ministerial body and did not have a responsibility to approve subdivision applications which complied with the Subdivision and Zoning Ordinances**, as reflected in the Planning Commission's pleadings and memoranda submitted to the Circuit Court in said proceeding;
- e. Baldau voted to deny the Spruce Hill Towns Community Impact Statement based on reasons outside the Subdivision Ordinance because he asserted that the applicant at CIS had not provided for the resolution of concerns not required to be addressed at CIS. Specifically, **Baldau asserted that the CIS should be denied** because of (i) **social impacts** on the demand for emergency services; (ii) concerns about **electric power surges** with Allegheny Power; (iii) **offsite traffic** concerns at the intersection of Huyett Avenue and Augustine Avenue; and (iv) **storm water control issues**;
- f. **Baldau has asserted that West Virginia Code Section 8-24-30 grants to the Planning Commission discretion to deny subdivision applications, notwithstanding the fact that Section 8-24-30 has been repealed and that Baldau has been specifically advised of the limited import of Section 8-24-30, in the context of subdivision applications by virtue of the decisions of the West Virginia Supreme Court in *Singer v. Davenport*, 164 W.Va. 665, 264 S.E.2d 637 (1980) and *Kaufman v. Planning and Zoning Commission of the City of Fairmont*, 171 W.Va. 174, 298 S.E.2d 148 (1982), specifically as follows: (i) on May 10, 2005, Baldau participated in a public meeting of the Jefferson County Planning Commission wherein Assistant Prosecuting Attorney Greg Jones discussed a May 5, 2005 letter to the Planning Commission advising the same of their responsibilities pursuant to West Virginia Code Section 8-24-30 and the impact of the**

*holdings of Singer and Kaufman; (ii) his **assertion of discretion** pursuant to Section 8-24-30 on **December 13, 2005** in relation to the **Thorn Hill Subdivision application** as set forth in the audiotape of said Planning Commission meeting; (iii) his **assertion of discretion** outside the terms and conditions of the Ordinance **in relation to general traffic issues** and concerns on U.S. Route 340, issues related to emergency services and issues related to the National Park as evidenced in the record of proceedings conducted on **April 11, 2006** in relation to the **Sheridan Subdivision application**; (iv) his **continuing assertions regarding traffic** on U.S. Route 340, **outside the requirements of the Subdivision Ordinance**, notwithstanding specific information from the West Virginia Department of Transportation, Division of Highways, together with issues relating to the National Park and emergency services also outside the requirements of the Subdivision Ordinance, as reflected in the record of the Planning Commission meeting conducted on June 13, 2006;*

- g. **Baldau has acted intentionally**, with forethought and with design to deny subdivision applications which otherwise comply with the Jefferson County Zoning Ordinance and the Jefferson County Subdivision Ordinance;*
- h. Notwithstanding his duties to act in a ministerial capacity on June 13, 2006, **Baldau publicly threatened** Planning Commissioner Greg Corliss, who is also a County Commissioner, **with political recriminations if, in fact, he voted in accordance** with the requirements of the Jefferson County Zoning Ordinance and Subdivision Ordinance;*
- i. Notwithstanding his duties to act in a ministerial capacity, Baldau, in his capacity as a Jefferson County Planning Commissioner, has appeared before a separate governmental body, the Jefferson County Public Service District on December 5, 2005, and **demand**ed that the **Jefferson County Public Service District seek approvals** of any of their planned sewage treatment facilities, notwithstanding the fact that the Jefferson County Public Service District is **not required to seek any such approval**;*
- j. Notwithstanding his duties to act in a ministerial capacity, Baldau, in his capacity as a Jefferson County Planning Commissioner, has appeared before a separate governmental body, the Jefferson County Public Service District on December 5, 2005, and indicated that **he would vote to oppose any subdivision or project which would provide a customer base for any newly-developed sewer facility to be built** by the Jefferson County Public Service District, and that **he would urge his colleagues on the Planning Commission to oppose any such projects**, unless the Public Service District first sought approval of the Planning Commission for any such sewer facility;*

- k. ***Subsequent to the threat stated on December 5, 2005 before the Jefferson County Public Service District, Baldau specifically opposed both the Thorn Hill and Sheridan Subdivision applications, which applications were necessary for the funding to build two (2) sewer treatment plants for the Jefferson County Public Service District, notwithstanding the fact that the Thorn Hill and Sheridan Subdivision applications satisfied the requirements of the Subdivision and Zoning Ordinances; and***
- l. ***In relation to the Sunnyside Industrial Park Community Impact Statement, Baldau demanded compliance with terms and conditions not required by the Zoning Ordinance, on the basis that compliance with unauthorized demands would be less costly to the applicant than an appeal.***

(Emphasis added.)

At trial before the three judge panel, the Petitioners offered into evidence Planning Commission and Public Service District records in support of each of the foregoing allegations contained in Paragraph 8(a) through (l) of the Removal Petition. Correspondence to the Planning Commission was offered into evidence documenting publicly provided advice of the Planning Commission's attorney regarding the ministerial obligations of the Commission. *See* Removal Petition Exhibits 1 and 2. Evidence was presented by way of minutes of the Planning Commission and Public Service District. *See* Removal Petition Exhibits 3, 5, 8, 15, 17 and 20-25. Evidence was presented by Transcript of Planning Commission Hearings, Exhibits 4, 6, 9, 11, 16, 18 and 19; Decisions of the Planning Commission, Exhibit 7; and Meeting Minutes and Transcripts from the Jefferson County Public Service District, Exhibits 12, 13 and 14. The Petitioners' evidence was submitted before the three judge panel through the words and actions of Baldau as reflected in the official transcripts of the Planning Commission and Public Service District. The Petitioners alleged that Baldau's conduct in asserting that the Planning Commission had discretion to act beyond the scope of its ministerial obligations was malfeasance in office. Each specific allegation of fact contained in Paragraphs 8(a) through (l)

of the Removal Petition was supported by a specific meeting minute, transcript and/or decision, whether the proceedings were before the Planning Commission or the Public Service District.

At the hearing on the Removal Petition, Baldau took the stand on his own behalf. In his testimony, Baldau asserted that the portion of the Benview decision identified in Paragraph 8(b) of the Removal Petition, which specifically states that the Planning Commission is “*not a ministerial body that is required to approve a final plat when all technical requirements and conditions of the Subdivision Ordinance have been met,*” was a misprint even though no action was ever taken to correct the alleged error by the Planning Commission or any of its members. Mr. Baldau also testified that he understood his duties to be “*ministerial*” in nature. *See* Benview Decision, Petitioners’ Exhibit 7 in the Removal Petition; See Page 241 Binder 1 transcript.

The three judge panel found no basis for removal, apparently believing Baldau on the contested record. However, the three judge panel did not find that any false statements were made in the petition or at the hearing. The three judge panel did not make a finding that no probable cause existed. The Circuit Court utilized the Finding before the three judge panel to grant summary judgment on the issue of liability in the malicious prosecution case that is the subject of this appeal. The result of the Circuit Court’s decision is that petitioners who fail in seeking to remove a Planning Commissioner are subject to civil liability as a matter of law, if the three judge panel finds insufficient evidence for removal.

While Baldau was allowed to stay in office based in part on his First Amendment right to speech, the Petitioners who sought to challenge his assertion of discretion apparently do not have the same First Amendment rights to petition the government in the Circuit Court of Jefferson County. This is a constitutional affront; a misapplication of summary judgment; and an

indication of the Circuit Court's erroneous interpretation of the concepts of *res judicata* and collateral estoppel.

III. ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in holding that *Noerr-Pennington* immunity does not apply to Petitioners' Removal Petition, which led to the Circuit Court's error in refusing to grant Petitioner's Cross Motion for Summary Judgment based on *Noerr-Pennington* immunity.
2. Whether the Circuit Court erred in denying the Petitioners' Motion to Amend to add *Noerr-Pennington* immunity and advice of counsel defenses.
3. Whether the Circuit Court erred in granting Baldau's Motion for Summary Judgment based solely upon the three judge panel's decision.
4. Whether the compensatory damages, punitive damages and attorney fee awards were erroneous due to the prejudicial effect of the Court's prior rulings and because there is no basis in law for an award for "*mental anguish, upset, annoyance and inconvenience.*"

IV. SUMMARY OF THE ARGUMENT

Petitioners are real estate developers in Jefferson County, whose projects often came before the Planning Commission for approval. The Petitioners' first hand experience and repeated contact with the Jefferson County Planning Commission led them to the honest opinion that Baldau was unlawfully manipulating the planning approval process in order to slow the rate of development in the County. Baldau repeatedly referenced the Planning Commission's discretionary powers and repeatedly made demands that are not within the purview of the Subdivision Ordinance to require. Based on Baldau's votes to deny applications and on the

various official documents and transcripts that recorded Baldau's words and actions, Petitioners asserted that Baldau's official acts amounted to official misconduct, malfeasance in office, incompetence and neglect of duty pursuant to the removal statute.

In the Petition for Removal, the Petitioners did not advance any facts that were not directly supported by official meeting minutes, transcripts and/or decisions. The three judge panel's decision, therefore, did not and could not have concluded that the Petitioner's factual allegations were untrue. Instead, the three judge panel's decision disagreed with the Petitioner's legal conclusion that Baldau's actions amounted to official misconduct in office, incompetence and neglect of duty pursuant to the removal statute.

Despite the Petitioner's careful drafting of the Removal Petition so as not exaggerate Baldau's conduct, despite no untruths being asserted, despite no personal attacks being made, Judge Steptoe concluded that dismissal of the Petition warranted an inference of malice on the part of all three Petitioners in Baldau's malicious prosecution action. Even if this were a run-of-the-mill malicious prosecution action, in which the defendants were not attempting to influence government action by exercising their First Amendment rights, the Petitioners' actions did not warrant an inference of malice because the record shows substantial documentation of their reasons for removal, thus negating lack of probable cause and malice.

In addition to failing to establish lack of probable cause and malice, the malicious prosecution action survive the *Noerr Pennington* immunity protections required by the First Amendment to the United States Constitution and Article III Section 16 of the West Virginia Constitution. Petitioners counsel repeatedly requested a ruling that filing a Removal Petition is

petitioning activity protected by the state and federal constitutions; however, the Circuit Court repeatedly refused to rule on this issue on at least five different occasions.²

Protection of petitioning activity is particularly important when the activity voices a disfavored position, or opposition to entrenched or incumbent governmental officials. Petitioning activity is designed to protect the voices of the minority as well as the majority, even when the minority or disfavored citizens happen to be developers who hold pro-development positions.

This matter of first impression should be resolved because of the chilling effect the Circuit Court's ruling has on rights to petition the government for redress. Had the Circuit Court applied the *Noerr-Pennington* doctrine of qualified immunity, Baldau would have been required to prove that the litigation was a complete sham—both objectively and subjectively baseless. The Circuit Court also erred because *Noerr-Pennington* immunity is presumed when petitioning is involved; therefore, it may be raised at any time in the proceeding. It was also error for the Circuit Court to deny the Petitioners' Motion to Amend their Affirmative Defenses. Furthermore, the court erred in concluding that malice and probable cause had been addressed by the three judge panel in Removal Petition action, and applied *res judicata* and collateral estoppel in a way that cannot be reconciled with West Virginia law.

The jury was obviously prejudiced on the issue of malice, upon which the awards of punitive damages and attorney's fees were based. The Circuit Court's direction to find liability, then instruct the jury that the Court had inferred malice directed the jury that the Petitioners had

² See for example Mr. Cassell's Rule 50 Motion trial transcript page 84 binder reflecting second day of trial, Post Trial Motion for Judgment as a Matter of Law/New Trial pages 5-11, Defendants' Response to Plaintiff's Reply to Post Trial Motions pages 4-6, Order Granting Plaintiff's Motion for Partial Summary Judgment, and Defendants' Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment.

acted maliciously. It was, therefore, impossible to have an unbiased jury determination of malice when guilt of “*malicious*” prosecution was part of the jury instructions.

The award of partial summary judgment took the issues of probable cause, malice and sham litigation away from the jury and the Petitioners were thus deprived of their ability to defend the malicious prosecution action. Thus, the trial was distorted in a way that prejudiced the determination of the one issue presented to the jury — damages.

V. **ARGUMENT**

A. **Noerr-Pennington Immunity is Not Limited to Defamation Actions and Applies to Petitioners’ Removal Petition**

1. **Constitutional Protection of Petitioning Activity Extends to the Judicial Process**

The First Amendment to the United States Constitution and Section 16 of Article III of the West Virginia Constitution protect the right to petition, and this Court recognizes that the protections extend to accessing the judicial process. *See Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549 (1993). An example of this right to petition through the judiciary is embodied in West Virginia Code §6-6-7, which sets forth a process for the removal of a government official.

The ability to petition the court for removal of a public official is a fundamental democratic protection afforded every citizen of West Virginia. It is akin to the right to vote because it ensures that public officials are serving at the will of the people they represent. Accordingly, the Removal Petition is fundamentally different from the ordinary lawsuit that attempts to collect damages or assess the rights of parties. Courts uniformly recognize the danger of chilling the constitutionally protected right to petition the government by hindering access to the courts, and therefore apply immunity to lawsuits that involve petitioning activity. Eighty citizens signed the petition, seeking government redress. If Baldau prevails in this action,

it will result in chilling the constitutional rights of all eighty petitioners and countless others who will hesitate to seek redress in the future if they perceive that exercise of their rights will lead to punishment by the government whose conduct was challenged.

2. Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine recognizes that lawsuits that are instituted for the purpose of petitioning the government are protected. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The doctrine originally involved antitrust litigation, but federal and state courts now unanimously apply the doctrine to common-law torts such as malicious prosecution and defamation. See e.g. *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-29 (3d Cir. 1999) (doctrine applies to common law claims of malicious prosecution, tortious interference with contract, tortious interference with prospective economic advantage, and unfair competition); see also *Igen International, Inc. v. Roche Diagnostics GMBH*, 335 F.3d 303 (4th Cir. 2003); see also *Nader v. The Democratic National Com.*, 555 F.Supp.2d 137 (D.D.C. 2008).

This Court recognized the *Noerr-Pennington* doctrine in the context of defamation in *Webb v. Fury*, 167 W.Va. 434, 282 S.E.2d 28 (1981). The *Webb* Court ruled that any petitioning of the government through the courts was absolutely privileged. Upon subsequent consideration of federal application of the doctrine, the Court narrowed its decision in *Webb* and held that the immunity is qualified. See *Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549 (1993). In the case of defamation, the Court applied the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964). See *id.*

This Court has not had the opportunity to consider the *Noerr-Pennington* doctrine in the context of malicious prosecution, but there is extensive federal and state case law on the subject. These courts have determined that the “*constitutional protection of the right to petition is no less compelling in the context of common-law tort claims than in the framework of federal antitrust legislation,*” and have applied the “*sham litigation*” exception to immunity as outlined by the Supreme Court in *Noerr. Cove Road Development v. Western Cranston Industrial Park Associates*, 674 A.2d 1234, 1237 (R.I. 1996). **Courts have emphasized that the sham exception must be “narrowly construed so as not to chill the rights of individuals and corporations to access to courts.”** *U.S. v. American Tel. ad Tel. Co.*, 524 F.Supp. 1336, 1364 (D.D.C. 1981).

The U.S. Supreme Court clarified the “*sham*” litigation test in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). In that case, the court ruled that an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent. *See Professional Real Estate* at 57. Therefore, petition or free speech in the context of litigation will be deemed to constitute a sham “*if it is both:*

(1) *objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring such government action, result or outcome, and*

(2) *subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.”* *Cove Road Development* at 1238.

Baldau should have had the burden of proving that the sham exception applied before the defendant's subjective intent would have become an issue. *See Professional Real Estate at 61. The Noerr-Pennington doctrine, therefore, provides both procedural and substantive safeguards to protect petitioning activity.* First, petitioning activity is granted a presumption of legitimacy by placing the burden on the non-petitioning party to prove that it is a sham. Second, the sham test provides a substantive two-part test (objective and subjective reasonableness) to evaluate when the alleged petitioning activity is illegitimate, therefore not petitioning activity at all. The latter should not be protected, but a strong presumption of legitimacy must exist in order to give force to the First Amendment of the U.S. Constitution and Article III Section 16 of the West Virginia Constitution, as the drafters intended. Otherwise, these constitutional provisions would be merely symbolic, without providing the rights they purport to grant.

Had Baldau been required to prove both elements of the sham test, he would have failed in his malicious prosecution action. First, objective reasonableness can be seen in the specific allegations in the Removal Petition and the official documents introduced to support those allegations. Additionally, Baldau admitted at the malicious prosecution trial that the Benview decision objectively shows probable cause for removal. (See Argument Subsection C.2. *infra*). Therefore, the Removal Petition had an objective basis and cannot be a complete sham.

Under the second prong of the *Noerr-Pennington* test, Baldau must show that the Petitioners harbored a motive to subvert the *legal process* for wrongful ends. *See id.* at 158 (citing *U.S. v. American Tel. ad Tel. Co.*, 524 F.Supp. 1336, 1364 (D.D.C. 1981)). In other words, the Petitioners had a motive other than seeing that the ends of justice are vindicated or that Baldau was removed from office. *See Allied Tube and Conduit Corp. v. Indian Head, Inc.*,

486 U.S. 492 (1988). There is no evidence whatsoever, and not even an allegation, that Petitioners used the legal process for wrongful ends. (See Argument Subsection A.3. *infra*).

If Baldau proved both elements, then the Petitioners would have been deprived of *Noerr-Pennington* immunity, but “*it does not relieve the Appellee of the obligation to establish all other elements of his claim.*” *Id.* Consequently, a court must first find that a suit was both objectively and subjectively baseless, then examine whether the elements of malicious prosecution were met.

3. Test for Subjectively Reasonable Litigation Shows that the Circuit Court Erred By Denying Petitioners’ Cross Motion for Summary Judgment

Petitioners were deprived of qualified immunity as mandated by *Webb* and *Harris*. The Circuit Court decided liability on the elements of malicious prosecution without inquiring into whether the litigation was both objectively and subjectively baseless. As a result, Petitioners were denied the presumption that their petitioning activity was conducted in good faith and was reasonable. Petitioners were thus deprived of the procedural and substantive protections designed to safeguard the First Amendment and Article III Section 16 of the West Virginia Constitution.

Based on the record and the test for subjectively reasonable litigation, it was clear error for the Circuit Court to deny Petitioners’ Cross Motion for Summary Judgment. The definition for lack of subjective reasonableness conclusively shows that the Petitioners’ Petition for Removal was not a complete sham. Litigation is subjectively baseless if it is actually an attempt to use the governmental *process* itself for its own direct effects. “*Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.*” *Cove Road Development* at 1238 (emphasis added). There has never been any question that Petitioners were attempting to use the government process for its legitimate

outcome or result. No evidence is in the record in the Removal Petition or in this malicious prosecution case that Petitioners had a purpose in instituting the litigation other than to actually remove Baldau from office, which would have been the legitimate outcome or result of the litigation. In other words, for the sham exception to apply, Petitioners must have instituted the removal process to achieve some other illegitimate goal that would have resulted from the litigation *process*, not the outcome.

Not only was there never any accusation that Petitioners tried to use the *process itself* for an illegitimate purpose, the record clearly shows that Petitioners genuinely tried to use the process for its legitimate *purpose*—removing Baldau from office. ***Because the Removal Petition was instituted for a legitimate end result, and was not subjectively baseless, this Court should as a matter of law grant the Petitioners Cross Motion for Summary Judgment.***

4. West Virginia Cases Have Not Limited Noerr-Pennington Immunity to Defamation Actions

This Honorable Court has not had the opportunity to apply the *Noerr-Pennington* doctrine to a malicious prosecution action. However, this Court’s analysis of *Noerr-Pennington* immunity has addressed petitioning activity generally, and has not limited the application of the doctrine to a specific tort. Accordingly, the doctrine applies to any state or federally protected petitioning activity in which a private citizen seeks government redress.

The only West Virginia cases invoking the *Noerr-Pennington* doctrine involved defamation. This Court first adopted the doctrine in *Webb v. Fury*, 167 W.Va. 434, 282 S.E.2d 28 (1981). In *Webb*, this Court’s analysis of whether the doctrine should apply to the facts began with whether the actions complained of involved petitioning. *See Webb* at 445-48. *Webb* did not address whether the *Noerr-Pennington* doctrine should only apply to defamation actions. Instead, *Webb* held that if a person attempts to “*induce the passage or enforcement of law or to*

solicit governmental action,” then the doctrine applies. *Id.* at 445. This Court further noted that, “such immunity is not limited to attempts to influence legislative and executive functions but extends as well to protect “*the use of administrative or judicial processes.*” *Id.* (quoting *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973)). Accordingly, *Webb* applies whenever a defendant attempts to petition the government through the use of the courts.³

The only other West Virginia case addressing *Noerr-Pennington* immunity, *Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549 (1993), did not limit application of immunity to a particular tort. In fact, the *Harris* court addressed only the narrow issue of whether immunity should be qualified or absolute.

Both *Webb* and *Harris* demonstrate the importance this Court places on the First Amendment right to petition the government for redress. For example the *Webb* Court said that, “*the right to petition for redress of grievances is ‘among the most precious of the liberties safeguarded by the Bill of Rights.’*” *Id.* at 442 (quoting *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967)). Additionally, *Webb* stressed that the right to petition the government “*shares the ‘preferred place’ accorded in our system of government to the First Amendment freedoms, and ‘has a sanctity and a sanction not permitting dubious intrusions.’*” *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516 (1945)). It is such an integral part of our democracy that “*the right to petition is logically implicit in and fundamental to the very idea of a republican form of government.*” *Id.* It is these principles that the Court sought to protect when it adopted the *Noerr-Pennington* doctrine. Accordingly, *Webb* and *Harris* are not limited in their application and clearly apply to all petitioning activity.

The only aspect of this Court’s analysis in *Webb* that was subsequently overturned by

³ Additionally, a petition to remove a public official is not only a use of the judicial process, it is also an attempt to influence legislative and executive functions. Such an important tool for petitioning should be subverted only in extreme circumstances, when it is abundantly clear that the litigation was a mere sham.

Harris was the degree of immunity applied to petitioning activity. *Harris* simply recognized that absolute immunity for petitioning activity would elevate the petitioning clause to a “*special higher status than the rights of freedom of speech and press.*” *Harris* at 468. Both *Harris* and *Webb* indicate that this Court contemplated qualified immunity for all petitioning activities in which a private citizen seeks redress from public officials. While the application of the doctrine to malicious prosecution actions is of first impression, the underlying constitutional concerns that were addressed in *Webb* and *Harris* — namely freedom to inform and persuade government action—are exactly the same as those presented in a malicious prosecution action arising from an attempt to petition the government through the courts. As noted in *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000), “*Noerr-Pennington immunity applies to any concerted effort to sway a public official regardless of the private citizen’s intent.*” (Emphasis added.)

5. Noerr-Pennington Presumptively Applies Whenever Petitioning Activity is Involved; Therefore, Petitioners Did Not Waive Immunity

In its award of Baldau’s Motion for Partial Summary Judgment, the Circuit Court held that *Noerr-Pennington* immunity is an affirmative defense and is therefore waived if not pled in the defendant’s first responsive pleading. The Fourth Circuit and other courts have disagreed, indicating that there is a rebuttable presumption of immunity; therefore, it is not waived if not asserted as an affirmative defense. See *IGEN International, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003); see also *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1558, n.2)(stating that *Noerr-Pennington* is “*not merely an affirmative defense,*” and the party opposing its application bears the burden of showing that it does not apply).

The Fourth Circuit recognized the application of the doctrine as a protection of First Amendment rights, including the pursuit of litigation, and acknowledged that there is a

“rebuttable presumption of Noerr-Pennington immunity,” which the defendant “was not required to plead as an affirmative defense.” *IGEN International* at 311.

The *IGEN International* court, however, decided the issue of whether the party asserting immunity had waived it on another basis. The Petitioner had requested leave to amend its pleadings to include the *Noerr-Pennington* defense. The Fourth Circuit found that even if the doctrine was to be considered an affirmative defense, it was error to deny the right to amend because it would not be prejudicial, and the amendment would not be futile. *See id.* The Fourth Circuit cited other circuits that hold an affirmative defense is not waived if it is raised at a “pragmatically sufficient time” and does not prejudice the other party. Petitioner’s raising of the issue at the summary judgment stage was “pragmatically sufficient” and, if allowed, would not have prejudiced Plaintiff.

B. The Circuit Court’s Denial of Petitioners’ Motion to Amend to Add Noerr-Pennington as a Defense was Erroneous

Before trial, Petitioners moved to amend their pleadings to include the defenses of advice of counsel and *Noerr-Pennington* immunity. The Circuit Court denied the motion, although the affirmative defenses related both to liability and punitive damages.

Rule 15 of the West Virginia Rules of Civil Procedure allows a party to amend his pleadings with leave of court, which leave is to be given freely “when justice so requires.” W.VA.R.C.P. 15(a)(2). This Court first addressed whether leave should be granted pursuant to Rule 15 to add an affirmative defense that was raised after the initial pleadings in *Nellas v. Loucas*, 156 W.Va. 77, 191 S.E.2d 160 (1972). The defendant in *Nellas* failed to raise statute of limitations as a defense until close of evidence at trial, at which time counsel sought leave of court to amend and supplement the answer in the context of a directed verdict. *See Nellas* at 80. The court denied the motion, and a jury verdict was returned in favor of the plaintiff. The

defendant then raised the statute of limitations defense in a motion to set aside the verdict, which the trial court granted.

This Court addressed whether the trial court abused its discretion by allowing the affirmative defense to be raised at such a late juncture in the proceedings. This Court held that it was not error to allow the defense but that the trial court should have allowed the plaintiff an opportunity to respond with evidence that may have challenged the appropriateness of the statute of limitations defense. *See id.* at 86. This Court reasoned that “*there are instances, as in the case before us, when justice would seem to require an amendment to assert [a Rule] 8(c) defense during or even after trial.*” *Id.* at 85. Accordingly, leave to add an affirmative defense should be granted if: (1) It promotes the presentation of the merits of the action; (2) the adverse party will not be prejudiced by the sudden assertion of the defense; and (3) the adverse party is given ample opportunity to meet the issue. *Nellas* at 85.

While *Nellas* involved additions of affirmative defenses, this Court later extended the *Nellas* three-part test to any motion for leave to amend. *See Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973)(overruled on other grounds). All recent West Virginia cases involving motions to amend apply the *Nellas* criteria, holding that “*motions to amend should always be granted when*” the three-part test is met. *Walker v. Option One Mortgage Corp.*, 220 W.Va. 660, 649 S.E.2d 233 (2007)(citing *Syl. Pts. 2 and 3, State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005)). This Court has noted that it takes a “*liberal view of the right to amend.*” *Rosier* at 871.

“*The purpose of the rule requiring a court to grant leave to amend pleadings when justice so requires is to secure an adjudication on the merits of the controversy as would be*

secured under identical factual situations in the absence of procedural impediments.” State ex rel. Vedder at 531. In other words, the rule promotes substance over form.

Petitioners in the present action sought to add advice of counsel as a defense to the malicious prosecution action. If a defendant “*in good faith seeks and acts upon the advice of a competent attorney at law in instituting and prosecuting a criminal or civil proceeding, after having made to such attorney a full disclosure of the pertinent facts, he is not subject to liability in a consequent action for malicious prosecution.*” *Truman v. Fidelity & Cas. Co. of N.Y.*, 146 W.Va. 707, 725, 123 S.E.2d 59, 70 (1961). Accordingly, advice of counsel is a complete defense to liability and is likewise a defense to punitive damages.

The request to amend was made prior to trial; therefore, it would not have prejudiced Baldau, who had ample time to prepare for the defenses. If Petitioners had been granted the opportunity to show that they relied upon the advice of their counsel in instituting the petition for removal, then an adjudication on the merits would have resulted in their favor. Unfortunately, Petitioners did not have the opportunity to present this defense, and Baldau prevailed despite good faith reliance on advice of counsel. As a result, the ends of justice goal promoted by this Court was not served, and Petitioners now suffer a judgment against them as a result.

Similarly, the *Noerr-Pennington* doctrine provides a complete bar to liability if Plaintiff fails to establish that the original suit was a sham. Petitioners maintain that *Noerr-Pennington* immunity is not an affirmative defense. Rather, when petitioning activity is involved, a presumption of immunity arises, which must be overcome by Plaintiff proving that the lawsuit was a complete sham. See *IGEN International, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003). Nevertheless, Petitioners sought to add the *Noerr-Pennington* doctrine as a

defense in order to ensure that it would be addressed due to the important constitutional implications.

The ends of justice strongly favored addition of the doctrine as a defense because Petitioners' rights pursuant to the First Amendment of the United States Constitution and Article III Section 16 of the West Virginia Constitution were at risk. Amendment to include the *Noerr-Pennington* doctrine would have allowed presentation of the merits as required by *Nellas*. Furthermore, the addition of an immunity defense would not have prejudiced Baldau, since Baldau was aware of the issue at the summary judgment stage and would have been given ample opportunity to prepare for the issues since trial on the merits was not yet scheduled.

Federal courts have allowed the addition of *Noerr-Pennington* immunity at late stages of litigation. In *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000), one defendant first raised the *Noerr-Pennington* doctrine in response to a motion for summary judgment, and was successful in achieving dismissal. The other defendant did not raise *Noerr-Pennington* immunity until almost a year later and eighteen days before trial. The court held that Bayou Fleet was aware that the doctrine could be an issue and was not prejudiced by its timing. Accordingly, the court applied the doctrine to the facts and held that the defendant enjoyed *Noerr-Pennington* immunity.

As discussed, *supra*, the Fourth Circuit also allowed addition of *Noerr-Pennington* immunity in *IGEN International, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003), after the answer had been filed but prior to trial. The court stated that, while it believed that the petitioning party “brought with it into [the] proceeding . . . a rebuttable presumption of *Noerr-Pennington* immunity,” the circuit court nevertheless abused its discretion in refusing to allow an amendment of the answer to add immunity as an affirmative defense. See *IGEN* at 311.

Like in *IGEN International* and *Bayou Fleet*, Petitioners in this case asserted the *Noerr-Pennington* doctrine—at summary judgment stage and in a motion to amend—in a pragmatically sufficient time, and Baldau would not have been prejudiced by its consideration. Accordingly, even if this Court finds that the doctrine is an affirmative defense, it was error to have denied Petitioners’ request to amend their answer prior to trial.

**C. The Circuit Court’s Award of
Partial Summary Judgment was Erroneous**

**1. The Three Judge Panel’s Decision Did Not Bar
Litigation of Probable Cause and Malice Under the
Doctrines of *Res Judicata* or Collateral Estoppel**

Baldau asserted and the Circuit Court held that the elements of malicious prosecution—probable cause and malice—could not be litigated because the issues were precluded by the decision of the three judge panel. However, neither *res judicata* nor collateral estoppel apply to bar litigation of the merits. If *Noerr-Pennington* immunity applies, then the first issue that must be litigated is whether the removal action was a complete sham. The issue of sham litigation was not addressed in the first suit; therefore, neither *res judicata* nor collateral estoppel apply.

Even if this Court holds that *Noerr-Pennington* immunity is not available to Petitioners, *res judicata* and collateral estoppel do not bar the defense of a malicious prosecution action. In order for the principle of *res judicata* to bar a subsequent action, 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. See *West Virginia Human Rights Com’n v. Esquire Group, Inc.*, 217 W.Va. 454, 618 S.E.2d 463 (2005); see also *Blethen v. West Virginia Dept. of Revenue/State Tax Dept.*, 219 W.Va. 402, 633 S.E.2d 531 (2006). “The rule of *res judicata* has no application where the causes of action are not the same.” *McNunis v. Zukosky*, 141 W.Va. 145, 89 S.E.2d 354 (1955).

The cause of action for malicious prosecution is obviously different from the original suit that sought to remove Baldau from the Planning Commission. In an action for malicious prosecution, the plaintiff must show: (1) that the prosecution was set on foot and conducted to its termination, resulting in plaintiff's discharge; (2) that it was caused or procured by the defendant; (3) that it was without probable cause; and (4) that it was malicious. *See Radochio v. Katzen*, 92 W.Va. 340, 114 S.E. 746 (1922). These malicious prosecution issues could not have been resolved in the prior action because the focus of the prior proceeding was the conduct of Baldau — not the conduct of any of the eighty (80) petitioners. Accordingly, the present action fails to meet the standard for *res judicata* by its very definition.

Collateral estoppel will bar a claim if: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *See Horkulic v. Galloway*, 222 W.Va. 450, 665 S.E.2d 284 (2008).

Petitioners previously litigated their belief that Baldau should be removed from the Planning Commission because he consistently expressed, contrary to West Virginia law, that his powers were discretionary when subdivision approval was ministerial if all technical conditions were met. By contrast, “[b]efore a recovery may be had in an action for malicious prosecution, both malice and want of probable cause on the part of the one instituting or instigating the proceeding must be established. The absence of either is fatal to a recovery.” *Donnally v. Fairmont Brewing Co.*, 87 W.Va. 494, 105 S.E. 778 (1921). Petitioners did not have the opportunity to litigate whether there was probable cause to bring the action or whether the action

was brought maliciously. “*Although malice may be inferred by a lack of probable cause, the question of the existence of probable cause depends on the defendant's honest belief of guilt on reasonable grounds.*” *Morton v. Chesapeake and Ohio Ry. Col*, 184 W.Va. 64, 67, 399 S.E.2d 464 (1990).

A California appellate court had the opportunity to address whether a court’s findings in a prior suit for misrepresentation could collaterally estop a defendant from proving probable cause in a malicious prosecution action. *Plumley v. Mockett*, 97 Cal.Rptr.3d 822 (Cal.App.2Dist. 2008). The *Plumley* court held that the judge’s opinion in the first suit—that a plaintiff’s version of the facts were completely and utterly false—did not establish lack of probable cause in the second action. The *Plumley* court held that the claims were not identical and were facially distinguishable. The first action was for misappropriation of an invention while the second involved whether there was reasonable cause to believe that there was misappropriation.

The court reasoned that the lenient standard for a probable cause defense in a malicious prosecution actions reflects “*the important public policy of avoiding the chilling of novel or debatable legal claims.*” *Plumley* at 834. The court noted that, “[p]laintiffs and their attorneys are not required, on penalty of tort liability to attempt to predict how a trier of fact will weigh the competing evidence or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.” *Id.* at 836. Accordingly, application of collateral estoppel to court findings in prior litigation would “*undermine our public policy of permitting parties to pursue nonfrivolous litigation without facing subsequent liability for malicious prosecution.*” *Id.*

The court finally noted that if collateral estoppel was granted, the plaintiff in a malicious

prosecution action would effectively be relieved of his burden to prove lack of probable cause and the defendant would be deprived of the ability to defend the action.

The concerns expressed by the *Plumley* court are amplified when a malicious prosecution action is brought in the context of a party petitioning the government for redress. *Plumley* recognized the chilling effect collateral estoppel could have on novel or debatable legal claims. **Collateral estoppel in the present action would additionally chill the constitutionally protected right to petition the government for redress by accessing the courts.** For this reason, it is of vital importance that this Court speak to the matter.

The issues that arose in *Hunter v. Beckley Newspapers Corp.*, 129 W.Va. 302, 40 S.E.2d 332 (1946), are instructive to this Court in this respect. In *Hunter*, a newspaper sued the circuit court's clerk to obtain certain records under his control. The newspaper failed to prove that it was legally entitled to the records, and the clerk subsequently filed an action for malicious prosecution.

The *Hunter* court first recognized that the clerk was “a public officer, a servant of the residents of [the] County, **subject to their criticism, and to such control as the law imposes upon him in the performance of his duties.**” *Hunter* at 312, 40 S.E.2d at 337 (emphasis added). The court then emphasized that “[t]he fact that plaintiff in that proceeding failed in his purpose, **does not, in any way determine the question whether he had probable cause to prosecute the proceedings.**” *Id.* at 312, 40 S.E.2d at 338. The *Hunter* court, therefore, held that a ruling on the initial cause of action does not in any way determine the result of a subsequent malicious prosecution action. Obviously, *res judicata* and collateral estoppel would not have applied in *Hunter* and are not applicable to the three judge panel's decision in this case.

2. **The Record Clearly Shows Probable Cause for Filing the Removal Petition**

The record is replete with evidence that the Petitioners neither lacked probable cause nor acted maliciously in filing the Removal Petition. Evidence of probable cause can be seen in the pleadings, which specifically reference precise meeting dates, minutes and documents to support the Petition. Petitioners' counsel advanced these same documents during the removal proceeding before the three judge panel to show that Petitioners had legitimate reasons to believe that Baldau's actions were removable offenses. Finally, the malicious prosecution trial transcript shows that Petitioners were honestly motivated to use the Removal Statute in the manner for which it was designed—to remove a public official for overstepping the bounds of his official duties.

The Benview decision, which was written by the Planning Commission and is an official document erroneously states in Conclusion of Law No. 1 that the Planning Commission has discretion to deny an application even when all technical requirements of the Subdivision Ordinance are met. Baldau admitted at trial that the Benview decision, as written, would warrant removal of a public official for malfeasance.

Baldau testified as follows at the trial:

Mr. Campbell: So you and I here today, I think it is April 23rd, 2009, agree that it would be misconduct for a Planning Commissioner to assert discretion where his duties are ministerial, is that correct?

Mr. Baldau: Yes.

Mr. Campbell: We agree that asserting discretion when your duties were ministerial would be wrong, is that correct?

Mr. Baldau: It would not be consistent with the law.

Mr. Campbell: And that might be malfeasance, misconduct?

Mr. Baldau: It certainly would not be consistent with the law. If somebody did it all of the time I suppose you could say that would be malfeasance.

See Pages 272-73 of transcript binder 1.

At the Removal hearing and at the malicious prosecution trial, Baldau testified that the portion of the Benview decision asserting discretion was erroneously written even though no efforts have been made to correct the error. Baldau recognized that repeated assertions of discretionary duties (Benview as written) would amount to a removable offense. This fact alone establishes that Petitioners had probable cause to believe that they would succeed in the underlying action. Jonkers testified that he relied upon the conclusions contained in the Benview decision when he filed the Removal Petition.

Additionally, Jonkers testified that Baldau's actions were consistent with the Benview decision. In other words it was apparent, based on Baldau's official acts, that Baldau was following the erroneous Conclusion of Law set forth in Benview. According to the Benview hearing transcript, Baldau said that, "***the only rationale given to approve this is that it meets the bare minimum of our zoning—zoning and—and subdivision ordinances.***" See transcript, binder 2 page 231. Baldau then argued to deny the Benview application for reasons outside the scope of the Subdivision Ordinance, which amounted to an unauthorized exercise of discretion. Accordingly, Baldau's actions were consistent with the "erroneously" written Benview decision.

Pursuant to West Virginia law, "*in an action for malicious prosecution, the facts and circumstances, knowledge, and information must be viewed from the standpoint of the defendants, and not that of the plaintiff; and if they in good faith, being men of ordinary prudence, entertain the reasonable belief that it was their duty to institute and maintain*

the proceedings complained of, they cannot be held liable therefore.” See Hunter v. Beckley Newspapers Corp., 129 W.Va. 302, 40 S.E.2d 332 (1946)(citing Porter v. Mack, 50 W.Va. 581, 401 S.E. 459 (1901)). To state it differently, it was not Petitioners’ burden to inquire whether the Planning Commission had erroneously drafted the Benview decision. A person of good faith and ordinary prudence would have believed that the decision accurately reflected the opinions set forth therein, and would have based his actions the decision as it was written.

The evidence presented by Petitioners at the removal hearing and at the malicious prosecution trial, viewed from the Petitioners’ perspective, can lead this Court to only one conclusion—that Petitioners had probable cause to file their Removal Petition. Baldau admitted this fact in the above-cited testimony when he said that if a Planning Commissioner asserts that he has discretion when he does not, it is a removable offense. Accordingly, the Circuit Court’s award of partial summary judgment is clearly erroneous, and Baldau’s malicious prosecution fails as a matter of law. See *Donnally v. Fairmont Brewing Co., 87 W.Va. 494, 105 S.E. 778 (1921)* (to prevail in a malicious prosecution action, plaintiff must prove both lack of probable cause and malice).

3. The Circuit Court Erred in Finding that the Petitioners’ Removal Petition Lacked Probable Cause Based Solely Upon the Three Judge Panel’s Decision

The Circuit Court ruled that the three judge panel’s decision, standing alone, conclusively proved that the Removal Petition was filed without probable cause. Probable cause “*is such a state of facts and circumstances known to the [Petitioner] personally or by information from others as would in the judgment of the court lead a man of ordinary caution, acting conscientiously, in the light of such facts and circumstances, to believe that the person charged is guilty.*” *Truman v. Fidelity & Cas. Co. of N.Y., 146 W.Va. 707, 123 S.E.2d 59 (1961).*

The three judge panel's decision did not inform the court of the state of facts known to the Petitioners personally or by information from others that led them to believe that Baldau was committing removable offenses. There is absolutely no way the Circuit Court could, by simply reading the panel's decision, come to any conclusions about what each and every Petitioner knew that led him to file the Removal Petition. As in *Hunter v. Beckley Newspapers Corp*, *supra*, “[t]he fact that the plaintiff in that proceeding failed in his purpose, does not, in any way, determine the question whether he had probable cause to prosecute the proceedings.” *Hunter* at 129 at 312, 40 S.E.2d at 338 (1946).

The only evidence presented in Baldau's Motion for Partial Summary Judgment regarding what Petitioners knew or believed and regarding the evidence they had in their possession was a portion of one of the Petitioners' deposition testimony. One Petitioner's testimony was not even enough to show *that particular* person's knowledge and intent, and could do nothing to show the knowledge and intent of the other Petitioners. Therefore, the evidence presented failed to meet Baldau's burden that probable cause did not exist and it was error for the Circuit Court to take the issue away from the jury.

4. The Circuit Court Erred by Inferring Malice from Lack of Probable Cause Based Solely on the Three Judge Panel's Decision

It was error to infer malice based upon lack of probable cause because probable cause could not be established by the three judge panel's decision. See *Wright v. Lantz*, 133 W.Va. 786, 58 S.E.2d 123 (1950). “*Want of probable cause and malice must both exist to justify an action for malicious prosecution.*” *Id.* at 794, 58 S.E.2d at 127. “*Where want of probable cause is shown malice may be inferred therefrom; but even if malice is shown, want of probable cause may not be inferred therefrom, but must be established as an independent proposition.*” *Id.*

Additionally, for malice to be inferred from the want of probable cause, the

circumstances proved must warrant the implication. *Southern Ry. Co. v. Mosby*, 112 Va. 169, 70 S.E.2d 517 (1911). There was no evidence before the Circuit Court at the summary judgment phase that indicated that the circumstances warranted an implication of malice. Instead, the circumstances showed that the Petitioners were exercising their constitutional right to petition the government through the judicial process.

Baldau will no doubt argue that malice was litigated in the trial for damages because malice was an element of punitive damages, and punitive damages were awarded. Whatever finding that was made at trial with regard to malice is invalid. The entire trial was prejudiced by the Circuit Court's instruction to the jury that the Petitioners were guilty of "*malicious prosecution*" and that "*malice has been inferred*" by the court. At the very outset of the trial, the jury was told by the court that malice had been shown. The jury found malice in the damages phase because the judge told them to do so in the jury instructions.

Additionally, the entire trial was an affront to the ideals of justice because the grant of summary judgment deprived Petitioners the safeguards to their constitutional rights—namely the presumption of petitioning validity and the requirement to prove that the litigation was a sham.

D. Damages Awards Were Erroneous

1. There is No Basis in Law for Damages in Malicious Prosecution Cases for "Mental Anguish, Upset, Annoyance and Inconvenience"

The Circuit Court instructed the jury that it could award Baldau general compensatory damages for "*mental anguish, upset, annoyance and inconvenience*," and, as indicated on the jury form, the jury made such an award of \$5,000.00. The court's instruction to the jury regarding compensatory damages was error because West Virginia law on malicious prosecution does not support an award of damages for "*mental anguish, upset, annoyance and inconvenience*."

The only West Virginia case that discusses available damages in malicious prosecution cases allows compensation for “*actual outlay and expenses about his defense in the prosecution against him, and for his loss of time, and for the injury to his feelings, person and character by his detention in custody and prosecution.*” Syl. Pt. 17, *Vinal v. Core* 18 W.Va. 1 (1881)(superceded by statute on other grounds)(emphasis added). Accordingly, injury to feelings, person and character are only recoverable in an action when the malicious prosecution was in the criminal context. Even if injury to “*feelings, person and character*” were recoverable in civil malicious prosecution cases, “*mental anguish, upset, annoyance and inconvenience*” are not encompassed.

General tort law in West Virginia does not support an award for mental anguish and upset. As stated in *Toler v. Cassinelli*, 129 W.Va. 591, 597, 41 S.E.2d 672, 677 (1947), “[*m*]ental suffering alone, unaccompanied by other injury, will not sustain an action for damages or be considered as an element of damages.” Additionally, “[*a*]nxiety of mind and mental torture are too refined and vague in their nature to be the subject of pecuniary compensation in damages, except where, in cases of personal injury, they are so inseparably connected with the physical pain that they cannot be distinguished from it, and are therefore considered a part of it.” *Id.* Application of these doctrines determines that it was error to allow damages for mental anguish and upset absent physical injuries. Likewise, Baldau cannot recover for annoyance and inconvenience because there is no authority under West Virginia law that supports such damages.

Once the general compensatory damages for “*mental anguish, upset, annoyance and inconvenience*” are disposed of, it becomes clear that there is no reasonable relationship between the more than fifteen to one ratio of punitive damages awarded (\$45,000.00) to actual damages

awarded (\$2,700.00). *See Vandevender v. Sheetz*, 200 W.Va. 591, 490 S.E.2d 678 (1997)(reducing jury award of 7:1 ratio of punitive to compensatory damages to upper limit of 5:1 ratio).

2. Punitive Damages Award was Error

The jury's award of punitive damages was prejudiced by the Circuit Court's instruction that "*malice has been inferred by this Court.*" *See* Jury Instructions; see also Trial Transcript pages 228-229. An impartial assessment of the Petitioners' behavior in the removal action was impossible in light of the court's instruction that it had already decided that the Petitioners acted maliciously. Simply stated, it may be properly inferred that the jury found that the Petitioners acted with malice, which warranted punitive damages, because the trial judge told them that he had already determined the issue of malice.

Additionally, punitive damages were not justified in the malicious prosecution action against Petitioners when examined in light of the factors articulated in *Garnes v. Fleming Landfill Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Punitive damages are awarded to punish outrageous behavior and to deter the defendant and others from taking similar action in the future. Neither goal is served by awarding punitive damages in this case.

Petitioners' behavior was far from reprehensible. Petitioners inflicted no physical harm, there was no reckless disregard of the health or safety of others, Baldau was not financially vulnerable (the County Commission paid his attorneys' fees), it was an isolated incident, and the evidence showed no actual malice, trickery or deceit.

By contrast, punitive damages have been deemed appropriate under West Virginia law, for example, in a case in which a defendant illegally recorded private conversations in public places, and when a defendant employer refused to hire someone based on a handicap in violation

of the Human Rights Act. *See Bowyer v. Hi-Lad Inc.*, 216 W.Va. 634, 609 S.E.2d 895 (2004); *see also Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997). These examples demonstrate the value of discouraging outrageous behavior by imposing punitive damages and that punitive damages are largely designed to affect the behavior of those that are not parties to the litigation.

Petitioners' removal action was an attempt to influence government action — a constitutionally protected right. Punitive damages serve to deter citizens from exercising their rights under the removal statute when they believe that their governmental officials have committed misfeasance or malfeasance in office; therefore, punitive damages are counterproductive under the circumstances.

3. Award of Attorneys Fees was Abuse of Discretion

This Court applies an abuse of discretion standard when reviewing a Circuit Court's award of attorney's fees. *See Beto v. Stewart*, 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003).

As a general rule, each litigant bears his or her own attorney's fees absent a contrary rule, express statute, or contractual authority for reimbursement. There is authority in equity to award attorney's fees when the defendants' acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See Syllabus Point 3, Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

The facts alleged in the removal action were all taken directly from Planning Commission and Public Service District meeting minutes, Planning Commission decisions, and official transcripts of both public bodies. The only allegations in the Removal Petition that Baldau objected to were Petitioners' legal conclusions regarding the facts contained in the official documents. Accordingly, none of the allegations contained in the Removal Petition

could have been the subject of a defamation suit because the Petition contained **no false facts**. The allegations were not of the outrageous; malicious; or false. In fact, the allegations were true: the record did indicate that the Planning Commission asserted that it had “*discretion*” in both Benview and Thornhill. Baldau did openly “*demand*” conditions not required by the Ordinance.

Furthermore, Petitioners were exercising a constitutional right, which they continue to assert in this appeal. The Removal Petition, therefore, was not the type of “*vexatious action*” that is typically present when the underlying action is based on a more sinister goal or is a criminal prosecution. A review of the evidence presented to the three judge panel conclusively demonstrates that the Defendants did not act in a wanton or oppressive manner. Accordingly, the award of attorney’s fees for the malicious prosecution action was an abuse of discretion.

VI. **CONCLUSION**

When this Court considers the history of petitioning the government for redress, as guaranteed by the Bill of Rights and the Circuit Court’s summary judgment award in this malicious prosecution case, it becomes clear that something went very wrong in the pursuit of justice in Jefferson County. Malicious prosecution has historically been a disfavored tort that for many years was only available in the context of criminal prosecutions. *See Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986): *see also* 52 Am.Jr.2d, Malicious Prosecution §5 (1970)(“*It is frequently said that the action for malicious prosecution is not favored in law*”). “*This is because of its tendency to impose a ‘chilling effect’ on the willingness of ordinary citizens . . . to bring potentially valid civil claims to court.*” *McCammon v. Oldaker*, 205 W.Va. 24, 31, 516 S.E.2d 38, 45 (1999)(citations and internal quotation marks omitted).

Civil malicious prosecution evolved to protect citizens from outrageous falsehoods and sinister motives in the institution of civil actions. However, civil malicious prosecution as a

cause of action *was never intended to hinder an individual's right to petition the government for redress, and it was certainly not meant to shield A Planning Commissioner from the criticism of the citizens he is appointed to serve.*

Baldau never questioned that the Petitioners' ultimate goal was to remove him from his position on the Planning Commission. Case law that examines petitioning activity through the judicial system holds that litigation cannot, as a matter of law, be subjectively baseless if the litigant's goal is the legitimate *outcome* of the proceeding. See *Cove Road Development v. Western Cranston Industrial Park Associates*, 674 A.2d 1234, 1237 (R.I. 1996) (“*use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects*”). This Court may look to this point alone to find that Petitioners' petitioning activity was not a sham, therefore was protected from the malicious prosecution suit.

Additionally, the official documents, transcript, minutes and pleadings presented to the three judge panel and to the Circuit Court affirmatively establish that the Petitioners filed their removal action based on probable cause and a sincere belief that they would prevail.

Accordingly, the award of summary judgment was clearly erroneous.

The Circuit Court of Jefferson County made numerous procedural mistakes and erroneous findings of law and fact, which can be readily corrected by this Court. A pragmatic view calls for a clear result. The Removal Petition simply cannot be the kind of litigation that was meant to be the subject of a malicious prosecution action. Baldau was an appointed governmental official, who voluntarily plunged into the middle of a hotly contested political debate and then complained when criticized by his constituency.

The Removal Statute provides for a unique cause of action that is specifically defined as petitioning activity as protected by the Constitution. The Removal Statute identifies what the

petition must contain; how many citizens must execute the petition; and the nature of the tribunal that will consider the merits of the petition for redress. Accordingly, a law suit filed pursuant to the Removal Statute must have greater protection from the perspective of the First Amendment.

Consider for a moment the perspective of any citizen presented by the petition filed in the Removal Action in Jefferson County. The petition identifies specifically a draft of a lawsuit alleging that Planning Commissioner Baldau asserts that that Planning Commission has discretion to deny applications that otherwise satisfy the requirements of the Ordinance. This is clearly and unequivocally what is alleged in the Petition for Removal.

Conceivably, if the petition alleged that Baldau was a thief and was stealing government money when no evidence of that misconduct existed, a malicious prosecution proceeding might be appropriate. But, in the case at hand, eighty (80) citizens, including the three (3) appellants in this case asserted specific dates and times when Planning Commissioner Baldau asserted by his words or his votes that the Planning Commission had the discretion to deny applications that otherwise satisfied the Ordinance.

It is respectfully asserted that the Removal Petition was constitutionally protected under the First Amendment of the United States and West Virginia Constitutions. **The Circuit Court of Jefferson County's grant of summary judgment on the issue of liability denied Plaintiffs the safeguards that allow the exercise of these rights.**

VII. RELIEF SOUGHT

Herb Jonkers, Louis B. Athey, and Eugene Capriotti, and their undersigned counsel, respectfully request that this Honorable Court recognize that an action to remove a public official pursuant to West Virginia Code §6-6-7 is petitioning activity that enjoys qualified immunity under the *Noerr-Pennington* doctrine and/or the West Virginia and United States Constitutions.

Petitioners further request that this Honorable Court rule that the record reflects that the
Petitioners had probable cause to file their Removal Petition and filed it for the sole purpose of
achieving a legitimate end; therefore, the judgment against Petitioners for malicious prosecution
must be reversed and judgment entered for Petitioners as a matter of law.

VIII. REQUEST FOR ORAL ARGUMENT

Herb Jonkers, Louis B. Athey, and Eugene Capriotti respectfully request an opportunity
to present oral argument before this Honorable Court on the issues raised in this Brief.

**HERB JONKERS, LOUIS B. ATHEY
and EUGENE CAPRIOTTI
By Counsel**

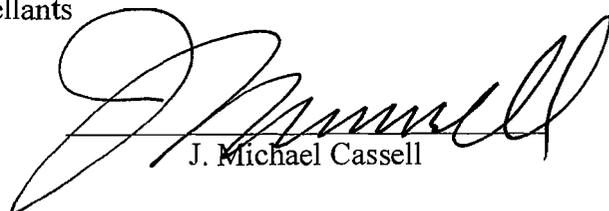


James P. Campbell, Esquire (WVSB #609)
J. Michael Cassell, Esquire (WVSB #670)
Campbell Flannery, P.C.
201 North George Street
2nd Floor
Charles Town WV 25414
(304) 725-5325 Telephone
(304) 724-8009 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service:	Federal Express
Date of Service:	July 28, 2010
Persons served and address:	David M. Hammer, Esq. Robert J. Schiavoni, Esq. Hammer, Ferretti & Schiavoni 408 West King Street Martinsburg, West Virginia 25401
Item Served:	Brief of Appellants



J. Michael Cassell