

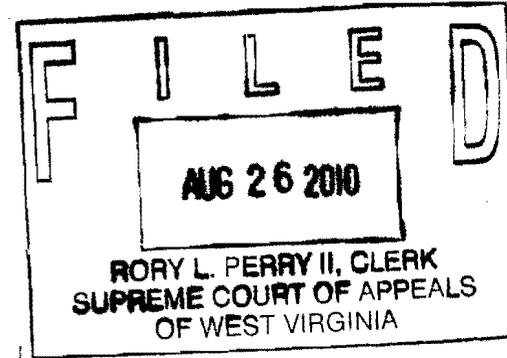
**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Todd Baldau, Plaintiff Below, Appellee,

vs.

No. 35650

Herbert Jonkers, an individual,
Louis B. Athey, an individual,
Eugene Capriotti, an individual,
Defendants Below, Appellants



RESPONSE OF APPELLEE

Submitted by:

David M. Hammer, Esq.
WV Bar I.D. # 5047
Robert J. Schiavoni, Esq.
WV Bar I.D. # 4365
HAMMER, FERRETTI & SCHIAVONI
408 West King Street
Martinsburg, WV 25401
(304) 264-8505

TABLE OF CONTENTS

Table of Authorities.....ii

I. History of the Case and
Nature of the Proceedings Below.....2

II. Argument.....5

 A. The Trial Court Allowed The Defendants to Attempt to
 Prove that the Allegations Made in the Removal Petitions
 were True and/or ere not Made with Malice-
 Defendants Failed-They Acted Without Any
 Bona Fide Claim of Right5

 B. The Trial Court was Correct-There is no Constitutional
 Protection for Baseless Litigation.....16

 C. The Trial Court Did Not Err in Refusing the Appellants’
 Untimely Motion to Amend Their Pleadings.....22

 D. The Circuit Court Did Not Err in Granting Partial
 Summary Judgment.....27

 E. Damages Are Warranted by both the Facts and the Law.....30

 1. Compensatory damages for Emotional Distress are Available at
 Law.....30

 2. Punitive Damages.....32

 3. The Trail Court Did Not Err in Awarding
 Attorney’s Fees and Costs.....33

Certificate of Service35

TABLE OF AUTHORITIES

<i>Bill Johnson's Restaurants, Inc.</i> , 461 U.S. at 743, 103 S.Ct. at 2170 and 2161 (1983).....	17
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508, 514 510-511, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972).....	27
<i>Cardtoonns v. Major League Baseball Ass'n</i> , 208 F.3d 885,891(10th Cir., 2000).....	18
<i>City of Del City</i> , 179 F.3d at 887,889.....	18
<i>Daugherty v. Day</i> , 145 W.Va. 592, 116 S.E.2d 131 (1960).....	27
<i>Daugherty v. Ellis</i> , 142 W.Va. 340, 97 S.E.2d 33 (1956).....	27
<i>Diersen v. Chicago Car Exchange</i> , 110 F.3d 481 (7 th Cir. 1997).....	24
<i>Estep v. Brewer</i> , 192 W.Va. 511, 453 S.E.2d 345 (W.Va., 1994).....	32
<i>Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n</i> , 663 F.2d 253, 263 (DC Cir. 1981).....	17
<i>Finney v. Zingale</i> , 95 S.E. 1046 (W.Va. 1918).....	29
<i>In Re Petition to Remove John G. Sims</i> , 206 W.Va. 213, 221, 523 S.E. 2d 273,281(1999).....	27
<i>Kemp v. Boyd</i> , 166 W.Va. 471, 485, 275 S.E.2d 297, 306-07 (1981).....	27
<i>Kesling v. Moore and Cain</i> , 102 W.Va. 251, 135 S.E. 246 [1926].....	27
<i>Lyons v. Davy-Pocohontas Coal Co.</i> , 75 W.Va. 739, 84 S.E. 744 (1915).....	29
<i>McDonald v. Smith</i> , 472 U.S. 479, 482 (1985).....	18
<i>North Carolina Electric Membership Corp. v. Carolina Power & Light Co.</i> , 666 F2d 50 (4 th Cir. 1981).....	27
<i>Orr v. Crowder</i> , 173 W.Va. 335, 315 S.E.2d 593 (1983), <i>cert. denied</i> , 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).....	30

<i>Preiser v. MacQueen</i> , 177 W.Va. 273, 275, 352 S.E.2d 22, 24 (W.Va.,1985).....	29
<i>Poling v. Belington Bank, Inc.</i> , 207 W. Va. 145, 153, 529 S.E.2d 856, 864 (1999).....	25
<i>Pote v. Jarrell</i> , 412 S.E.2d 770, 186 W.Va. 369 (W.Va., 1991).....	32
<i>Powers v. Goodwin</i> , 170 W.Va. 151, 291 S.E.2d 466 (1982).....	4,21
<i>Rissler v. Jefferson County Board of Zoning Appeals</i> , No. 35274 (W.Va. 4/1/2010).....	11
<i>Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC</i> , 209 W.Va. 318, 326, 547 S.E.2d 256, 264 (2001).....	26
<i>United States v. Cruikshank</i> , 92 U.S. 542, 552 (1876).....	18
<i>Van Hunter v. Beckley Newspapers Corporation</i> , 129 W.Va. 302, 40 S.E.2d 332 (1946).....	29
<i>Warner v Jefferson County Comm'n</i> , 198 W.Va. 667, 671-2 482 S. E.2d 652, 656-7 (1996) and Syllabus Point	4
Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1489, 2008 Pocket Part, pp. 127-129.....	24

I. History of the Case and Nature of the Proceedings Below

Todd Baldau, a citizen volunteer who served as one of nine members of the Jefferson County Planning Commission, was singled-out¹ by these defendants to be subjected to two removal petitions ostensibly filed pursuant to W. Va. Code § 6-6-7 [1985]. This statute provides a procedure for the removal of, among others, any person who has been appointed to any county office. W. Va. Code § 6-6-7(a). An appointed official may be removed from office “for official misconduct, malfeasance in office, incompetence, neglect of duty, or gross immorality or for any of the causes or on any of the grounds provided by any other statute.” *Id.* West Virginia Code § 6-6-1 [1919] provides guidance as to the definitions of the terms “neglect of duty” and “official misconduct” as including “the willful waste of public funds,” or “the appointment by him or them of an incompetent or disqualified person.” *Id.* The term “incompetence” includes “wasting or misappropriation of public funds by any officer, habitual drunkenness, habitual addiction to the use of narcotic drugs, adultery, neglect of duty, or gross immorality, on the part of any officer.” *Id.*

The Petitions were verified solely by the three defendants in this case. Of the three petitioners who verified their allegations, Appellant Jonkers was not a resident of West Virginia. None of the other seventy-seven signatories to the Petition verified the allegations in the removal petitions; twenty-five of the signatories were not residents of

¹ See the three judge panel’s Order, “Findings of Fact” ¶s 8 – 12, 15, 20, 23 - 24 to understand the malice with which Mr. Baldau was singled-out by the appellants. The three judge panel was quite disturbed by the targeted attack against Mr. Baldau as evidenced in paragraph 17 of the judges’ “Conclusions of Law”: “No reasonable, logical or rational explanation was presented by the Petitioners as to why they seek to remove only the Respondent from the JCPC.” As a high ranking federal official, Mr. Baldau’s security clearance and possibly even his public service career were particularly vulnerable to damage from the types of allegations contained in the removal petitions. *E.g.*, Trial tr., Day 1, p. 165 (implications for his job were serious), 270 (put his security clearance in jeopardy and potentially subjected him to removal proceedings).

Jefferson County (twenty were residents of other states and thus, like Jonkers, not eligible to vote in West Virginia); a number of the petition signers were employees of the defendants who had never attended a Planning Commission meeting during Mr. Baldau's appointed term of service.²

At paragraph 8 of the removal Petition it is alleged that Mr. Baldau, a member of the Jefferson County Planning Commission ["JCPC"], has "committed multiple acts of official misconduct, malfeasance in office, incompetence and neglect of duty."

Paragraphs 8(a) through (l) contain the gravamen of the Petition. Essentially, the petitioners framed the issue for removal as to whether Mr. Baldau committed malfeasance when he voted against certain development proposals based upon his understanding, aided by the legal advice of the Prosecuting Attorney's office (which, as discussed *infra*, included the specific legal advice of Appellants' counsel J. Michael Cassell who was then legal counsel to the JCPC) of the Jefferson County Subdivision Ordinance.

A full trial upon the merits was held on January 30, 2007 before a three judge panel appointed by the West Virginia Supreme Court. It was readily apparent that the case for removal was a farce. On February 1, 2007 immediately following the three judge panel trial and in an effort to mitigate attorney's fees and costs that would necessarily be incurred when ordering the transcript and preparing proposed findings of fact and conclusions of law as ordered by the three judge panel, Baldau authorized a polite letter to the defendants stating:

² At the three judge panel trial of the removal action Mr. Baldau sought to compel the testimony of a number of those people who had signed, but not verified, the Petition. Counsel for the Appellants asserted representation of the witnesses and succeeded in having the subpoenas quashed and as a result they did not testify at the trial.

It was apparent to me, and I suspect to you too, that your clients did not present evidence sufficient to justify the removal of Mr. Baldau from office.

The court reporter is now preparing the transcript of the hearing and of course, I will soon begin drafting the post-hearing memorandum and proposed findings of fact and conclusions of law as ordered by the three judge panel.

I am writing to you, therefore, to advise you that I would not oppose your voluntary dismissal of this action with prejudice so as to spare everyone from incurring the fees, costs and judicial resources that such post-trial matters will necessarily entail.

The Appellants made no response. Trial tr., Day 1, p. 183. At trial, Appellant Athey explained that he had no interest in dismissing the action.

On August 20, 2007 the three judge panel unanimously concluded as to the entirety of the removal petition: "There is not a scintilla of evidence in this case to support any of the allegations within the Petition that the Respondent, in the performance of any of his duties as a member of the JCPC or at the Jefferson County Public Service District meeting, to which he was invited, violated the law or his oath of office." Order, entered August 20, 2007, ¶ 19.

On August 29, 2007 pursuant to the binding precedent of *Warner v. Jefferson County Comm'n*, 198 W. Va. 667, 671-2, 482 S. E.2d 652, 656-7 (1996) and Syllabus Point 3, *Powers v. Goodwin*, 170 W.Va. 151, 291 S.E.2d 466 (1982), Baldau requested payment of attorneys' fees and costs from the Jefferson County Commission. Payment of the same was later approved and paid by the Jefferson County Commission.³

³ The Jefferson County Commission had previously authorized payment of Baldau's fees and costs for Baldau I – the first removal petition. Appellant Athey, represented by Mr. Cassell and Mr. Campbell, counsel for these Appellants, sought to interfere with that payment by seeking to restrain and enjoin Mr. Baldau's legal counsel from depositing the check. The injunction was denied. See *Order from December 20, 2006 Hearing Denying Petitioner's Request for Temporary Restraining Order, Preliminary and Permanent Injunction and Writ of Prohibition*, Jefferson County, Civil Action No. 06-C-416 entered January 16, 2007. Baldau presented to the jury Athey's attempt as further evidence of a plan to hector him out of office by denying him access to legal counsel by denying payment to legal counsel.

Baldau's malicious prosecution suit, filed on October 5, 2007, alleged at paragraph 5: "The Defendants acting individually, in conspiracy with each other, and in conspiracy with others, including their legal counsel at the time, caused to be filed two separate petitions pursuant to W. Va. Code § 6-6-7 seeking the removal of Todd Baldau from the Jefferson County Planning Commission [hereinafter "JCPC"]." Despite this allegation, attorneys Campbell and Cassell chose to continue as counsel in this matter and proceeded with a unified defense of all of the defendants.

The Answer, although it contains seventeen affirmative defenses, did not assert the affirmative defense of good faith reliance upon the advice of counsel. Thus, no discovery was conducted upon this issue. It also did assert any immunity based on common law or statute, such as the Noerr-Pennington doctrine.

The procedural history of this case is accurately set forth by the Circuit Court of Jefferson County in ORDER DENYING DEFENDANTS' POST-TRIAL MOTION entered November 30, 2009 and so the Appellant does not repeat it again here.

II. Argument

A. The Trial Court Allowed the Defendants to Attempt to Prove that the Allegations Made in the Removal Petitions were True and/or Were Not Made with Malice – Defendants Failed – They Acted Without Any Bona Fide Claim of Right

At trial the Appellants persuaded the trial judge that a distinction existed between the conclusion of the three judge panel in ¶ 19 that there was "not a scintilla of evidence in this case to support any of the allegations within the Petition..." and a finding of actual malice by the jury which the defendants contended was a necessary predicate to an award of punitive damages by the jury:

Judge Sanders: Mr. Cassell is making an important distinction from the vantage point of the Defendants that it doesn't say there was not a scintilla of truth or not a scintilla of fact, but there was not a scintilla that even if the grounds listed were true, they support a removal. Now, if in characterizing the allegations in the petition as crap in his testimony, the Plaintiff, one plain inference that a jury could put to that is it was famously false, famously false, something that is merely not grounds for removal are two different types of animals. If we were here only for the attorney's fees and only for the consequential damages from removal, that is one thing, but we have punitives are pled for the emotional distress, that is, frankly, a little bit different because even though summary judgment means that the jury is directed that malice is inferred, the nature and extent and intensity of not only the reasonable reaction to it, but the nature and extent of the malice itself is a question that juries are directed to consider when they are considering whether or not punitives should flow and in what amount...**I believe the threshold has been opened and the Defendant has the right to ask those questions, is this true, is this untrue, were you affronted and caused emotional distress, is this crap because this is untrue.**

Trial tr., Day 1, pp. 221 – 222 [boldface added].

The result of the trial court's ruling was exactly what the Appellee had urged against on grounds of collateral estoppel: a complete re-trial of each and every allegation made in the removal petition against the Appellee. Indeed, beginning at page 229 of Day 1 of the trial transcript and continuing for the rest of Day 1, the testimony of appellants Athey and Jonkers on Day 2, and the rebuttal testimony in Day 3, the case was transformed from one of damages only, to an examination of the states of mind of each of the appellants at the time they filed the removal petitions. The Appellants were granted wide latitude to testify regarding the very same exhibits and their supposed conclusions that they had drawn from those exhibits just as they had when they presented their removal case to the three judge panel. In turn, Appellee cross-examined the appellants as to the unreasonableness and untruthfulness of their representations.

The Appellants have chosen to completely ignore the record in this case and have failed to cite this Court to testimony that unequivocally demonstrates the complete absence of a subjective or objective good faith basis for making the allegations contained in the two removal petitions filed against Mr. Baldau as well as the untruthfulness of the allegations themselves. There are many examples of testimony that showed not only the falsity of the allegations made in the removal petitions but were also more than sufficient for the jury to find actual malice:

- Athey agreed that the petition was not “technically accurate” in alleging that Baldau himself made the decisions on subdivision applications. Trial tr., Day 2, p. 161;
- Athey is rebutted in his claim that Baldau would do everything in his power to see that subdivision applications were denied (*id.* at p. 153) when he admitted that Baldau had voted to approve three out of four of Athey’s projects. *Id.* pp. 164 – 5;
- Athey admitted that despite the allegation in the removal petition and his own direct testimony, it was another planning commissioner, not Baldau, who challenged the assertion that the planning commission lacked authority to deny subdivision applications that met the technical requirements of the subdivision ordinance. *Id.* pp. 167 – 169;
- Athey admitted that as to the Benview subdivision’s written decision, it was prepared by the prosecuting attorney, motioned for approval by a planning commissioner other than Mr. Baldau, unanimously approved, and signed by the

president of the planning commission – again, not Mr. Baldau as alleged in the removal petition. *Id.* pp. 171 – 172.

- Athey admits that he, Jonkers and Capriotti singled-out Baldau for removal. *Id.* p. 173. The manifest malice of such targeted attack is evident from the “Findings of Fact” numbered 8 – 9 from the 3 judge panel decision which showed that Baldau had voted to approve 58 final plat applications, voted to disapprove eight final plat applications, and of those eight, Baldau was in the majority on three of those disapprovals.
- Jonkers’ testimony that Baldau “threatened” Corliss during a planning commission meeting was rebutted by the testimony of Corliss [Trial tr., Day 3, p. 16], Mr. Sidor and Mr. Sims both then members of the Planning Commission, as well as by playing the actual tape of the meeting. Jonkers, apparently not realizing that there was a tape recording of the meeting, had testified on direct examination “that if wasn’t a threat I don’t know what it would be...he did everything except come out of his chair...very vocal” and raised his voice. Trial tr., Day 2, p. 224. After hearing the tape recording of the calm and measured exchange between Baldau and Corliss, the jury could only have concluded that Jonkers was exaggerating or even fabricating his testimony.
- The petitioners alleged that Mr. Baldau should be removed for purportedly approving and consenting to pleadings and memoranda **filed by the Jefferson County Prosecuting Attorney in an appeal filed in Jefferson County Circuit Court by Thorn Hill**. Petition, ¶ 8 (d). The Planning Commission did not ever review in advance or approve the filings made by the Prosecuting Attorney. It is a

fair question to ask how could the Appellants and their legal counsel have possibly had either a subjective or objective good faith belief that individual lay volunteers to a public body have a legal duty to independently supervise the pleadings and memoranda of a prosecuting attorney representing such public body? Obviously, a preposterous notion for which there could not possibly be a good faith subjective or objective belief and yet that served as a basis for the removal petitions.

- The petitioners also contend that Mr. Baldau should be removed from office for attending a public meeting of the Jefferson County Public Service District on December 5, 2005 to which he had been invited by a county commissioner.⁴ The Petition alleges that Mr. Baldau attended that PSD meeting “...**in his capacity as a Jefferson County Planning Commissioner....**” Petition, ¶ 8 (j). The transcript of that meeting, which Appellants had in their possession, unequivocally refutes that allegation because Mr. Baldau twice expressly stated that he was not appearing as a representative of the planning commission:

Speaker: Are you speaking for the Planning Commission?

Mr. Baldau: No, I said I'm speaking for myself.

Hrg. Tr., at p. 10, ln. 19 – 22.

Indeed, Appellant Capriotti **knew** this at the time he verified the instant petition:

Q. Do you recall Mr. Baldau saying whether he was appearing in his official capacity as a member of the Planning Commission or in his individual capacity?

A. I think he stated his name and said that he was not representing the Planning Commission – no, he was a member of the Planning Commission, but he wasn't there representing the Planning Commission.

⁴ Order, Findings of Fact ¶ 25.

Deposition testimony read to the Jury.

As indicated above, there was an official recording of this meeting. Even if the appellants or their legal counsel had not been present at this public meeting (and they testified they were present), they should have listened to the tape recording before making their baseless allegation. The appellants could not have had a subjective or objective belief in this allegation and it is a fair inference that their verifications of the same violated W. Va. Code § 61-5-2.

- The Appellants alleged in paragraph 8(c) of the Petition that Baldau asserted that W. Va. Code § 8-24-30 grants the Planning Commission discretion to reject subdivision applications even though § 8-24-30 had been repealed. This was a particularly troubling allegation coming as it was from attorney Cassell, now serving as attorney for Defendants Jonkers, Capriotti, and Athey in the instant case. Attorney Cassell had been the legal counsel to the Planning Commission and had provided advice to the Planning Commission on this very issue explicitly instructing the Planning Commission that they were still to apply the provisions of 8-24-30 because those provisions were incorporated into the subdivision ordinance itself⁵:

Q. Now Exhibit 10 that I showed you a few moments ago, the attorney letter, that attorney letter told you that you should continue to apply 8-24-30, do you see that?

A. Right.

⁵ “Upon further reflection and legal research, I have come to the conclusion that § 8A-4-7 (effective June 12, 2004) allows the Planning and Zoning Commission to continue to construe Article 7 of the Subdivision Ordinance according to the provisions of West Virginia Code § 8-24-30... This recommendation to retain the status quo with our Subdivision Ordinance will prevent a fragmented and possibly confusing amendment process.” Letter to the Jefferson County Planning and Zoning Commission from its legal counsel, J. Michael Cassell. Trial exhibit 10.

Q. And who is the attorney that wrote that letter to the Planning Commission?

[Objection and ruling]

Q. Can you point to the attorney in this room who authored that letter for the Planning Commission?

Mr. Campbell: I will stipulate Michael Cassell if that move[s] things along.

The Witness: Mike Cassell who was an Assistant Prosecuting Attorney at that time working for the County Commission.

Trial tr., Day 3, pp. 29 – 30.

Thus the conspiracy alleged in paragraph five of the Complaint between the Appellants and their legal counsel was laid plain for the jury to see; the Appellants and attorney Cassell had twice brought removal petitions against Baldau for following the exact advice given the Planning Commission by Mr. Cassell when he himself had represented the Planning Commission!⁶

The jury also heard the deposition testimony of Appellant Capriotti. This testimony established a complete lack of any basis whatsoever for the “verified” allegations contained in the removal petitions. What follows is a cross-examination that was read to the jury covering both the statutory grounds for removal as well as an examination of the averments in the removal petitions that Appellant Capriotti verified. Appellant Capriotti’s testimony is emblematic of the lack of any such subjective or objective good faith basis for making the removal allegations against Baldau and demonstrates actual malice:

⁶ See also *Rissler v. Jefferson County Board of Zoning Appeals*, No. 35274 (W.Va. 4/1/2010) (W.Va., 2010) (discussing the impropriety of attorney Cassell representing Thorn Hill before the Jefferson County Board of Zoning Appeals after having served as legal counsel to the Board of Zoning Appeals while it was considering the Thorn Hill application). Thorn Hill was owned at all times relevant to this case by, inter alia, Appellants Jonkers and Capriotti. See Dr. Richard Latterell’s testimony on pages 70 - 73 of Day 2 wherein he discusses how he and two other citizens, out of about twelve citizens, were singled-out for suit by Jonkers, Capriotti and their attorneys Cassell and Campbell for having filed a BZA appeal of Thorn Hill.

- Q. Well, can you recall any specific Planning Commission meeting where you thought that Todd Baldau acted improperly or inappropriately?
- A. No, I cannot.
- Q. Well, are you saying that he spent public funds improperly?
- A. I don't know that he has or he hasn't.
- Q. So when we go to the hearing on this matter on the 30th, I'm not going to hear that he wasted public funds?
- A. Not from me.
- Q. I'm not going to hear from you that he appointed some disqualified person?
- A. He appointed?
- Q. Yes, sir. I'm going through the statute, I'm not going to hear that?
- A. Not from me.
- Q. I'm not going to hear that he engaged in habitual drunkenness?
- A. Drunkenness?
- Q. Yes, sir.
- A. Not from me.
- Q. Are you going to testify that he is habitually addicted to narcotic drugs?
- A. Of course not.
- Q. Are you going to testify that he engaged in adultery?
- A. In what?
- Q. Adultery. Are you going to testify to that?
- A. I have no knowledge of any of that.
- Q. Are you going to testify to gross immorality?
- A. No.

Q. Why do you say that he's acted intentionally with forethought and with design, to deny subdivision applications?

A. Again, I'd have to defer to my partners, and Mr. Campbell.

Q. Do you have any personal knowledge of those allegations?

A. No.

Referring to the Public Service District meeting referenced at paragraph 8I of the Petition:

Q. Do you recall Mr. Baldau saying whether he was appearing in his official capacity as a member of the Planning Commission or in his individual capacity?

A. I think he stated his name and said that he was not representing the Planning Commission – no, he was a member of the Planning Commission, but he wasn't there representing the Planning Commission.

* * *

Q. Why in paragraph 8I do you allege that in his capacity as Jefferson County Planning Commissioner, he appeared before a separate governmental body?

A. Why? What was the question again?

Q. You understood he was appearing individually, yet in paragraph 8I you said that he appeared in his capacity as a Jefferson County Planning Commissioner?

A. Well, again, I have to defer to my counsel, you know, that's – what's here is what I signed, of course.

Referring to paragraph 8K of the Petition [official misconduct]:

Q. What act are you alleging in paragraph 8K that you feel was official misconduct?

A. He's specifically opposed to Thorn Hill and the Sheridan Subdivision applications, which applications were necessary for the funding to build two plants to give them to the PSD.

Q. So what's the misconduct?

A. Well, why he would do that, I don't know.

Q. You don't know why he opposed those two projects?

A. No....

* * *

Q. As you sit here today, you don't recall anything that Mr. Baldau said during those two hearings?

A. I really don't.

Q. And do you recall what Mr. Baldau said as to why he opposed the Thorn Hill Subdivision?

A. I don't.

Q. Do you recall what Mr. Baldau said as to why he opposed the Sheridan Subdivision?

A. No.

Referring to paragraph 8L of the Petition [Sunnyside Development]:

Q. What were the terms that Mr. Baldau demanded compliance with?

A. I don't know. Are you speaking of the unauthorized demands?

Q. Yes.

A. I don't know.

Q. So when you verified this, you didn't know what you were referring to?

A. No.

Appellant's lack of any knowledge or good faith basis for verifying the allegations exemplifies the fraud upon the judicial system attempted by these appellants

and both the verification and the procurement of that verification by their legal counsel⁷ were likely in violation of W. Va. Code § 61-5-2 which prohibits false swearing.⁸

The jury concluded that singling-out Baldau for removal under these circumstances, and given the weight of the other evidence showing that removal allegations were knowingly false when made, was actual malice.

In denying the Appellants' post-trial motions, the trial court found:

The central and predominating issue at trial was whether the defendants' conduct toward the plaintiff was done with "actual malice." The Court defined "actual malice" in its instructions to the jury as "a sinister or corrupt motive such as hatred, personal spite, a desire to injure the plaintiff or a conscious disregard of the rights of others." However, the Court was persuaded by the defendants' argument that notwithstanding the Court's finding of inferred malice in its order granting partial summary judgment, it was still essential to the recovery of punitive damages that the plaintiff prove that the alleged wrongful acts of the defendants "must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations." *Instructions*, p. 4. The Court further instructed the jury that "a wrongful act, done under a *bona fide* claim of right, and without malice in any form, constitutes no basis for such damages." *Id.*

The issue of whether the defendants acted under a *bona fide* claim of right opened the door to the defendants to present all or very nearly all of the evidence that they had previously presented during the trial of Baldau II and which was thoroughly rejected by the unanimous decision of three judge panel in its holding quoted *infra*. The Court allowed the defendants, over the plaintiff's objection, to introduce as evidence voluminous records that the defendants contended established a *bona fide* claim of right to file the two removal actions. The Court also allowed the testimony of defendants⁹ Jonkers and Athey, as each allegation in the two removal petitions was displayed on a large illuminated screen, to explain, one by one to the jury, the alleged basis for each of those allegations and to testify that they subjectively believed the allegations in the two removal petitions to be true. The jury also had read to them the deposition testimony of defendant Capriotti which the plaintiff argued evidenced defendant Capriotti's

⁷ Attorney James Campbell was not only legal counsel; he was also a business partner with Appellants Jonkers and Capriotti in their land development schemes. Trial tr., Day 2, p. 174. The Complaint alleges a conspiracy with legal counsel.

⁸ "To willfully swear falsely, under oath or affirmation lawfully administered, in a trial of the witness or any other person for a felony, concerning a matter or thing not material, **and on any occasion other than a trial for a felony, concerning any matter or thing material or not material, or to procure another person to do so, is false swearing and is a misdemeanor.**"

⁹ Defendant Capriotti did not appear at the trial of this case. He likewise did not appear at the trial of Baldau II. As a consequence, this Court and the three judge panel relied upon his deposition testimony.

complete and total lack of any basis for bringing the removal charges against Mr. Baldau and the falsity of his verifications of the same.

Having considered all of this evidence, the arguments of counsel, and the Court's instructions the jury unanimously answered "YES" to the following special interrogatory specifically requested by the defendants: "A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for Punitive Damages. Do you find the Defendant(s) acted maliciously, wantonly, mischievously, or with criminal indifference to the rights of Todd Baldau such as to justify an award of Punitive Damages?"

Order Denying Defendants' Post-Trial Motions, pp. 5 – 7.

Thus, after hearing all of the evidence as to the Appellants' states of mind at the time they filed the removal petitions along with a full examination of the truthfulness or lack of truthfulness of the removal allegations themselves, the jury concluded that Appellants did not act under a bona fide claim of right. Had the jury believed the defendants' testimony as to their collective state of mind or the truthfulness of the removal allegations it obviously would have found that the Appellants acted under a *bona fide* claim of right. Instead, the jury found that the Appellants acted maliciously, wantonly, mischievously, or with criminal indifference toward Baldau. Appellants arguments to the contrary notwithstanding, they have received a full measure of constitutional protection and, their statements having been determined to be untrue and maliciously made, Baldau is entitled to his verdict.

B. The Trial Court was Correct – There is No Constitutional Protection for Baseless Litigation

Essentially, the Appellants would have this Court find that judicial petitioning activity is absolutely immune under the First Amendment and the Noerr-Pennington doctrine. While it is true that the Noerr-Pennington doctrine has been extended beyond its original purpose of preventing federal statutes from interfering with First Amendment

rights, no case has ever applied Noerr-Pennington so as immunize false statements made with malice in any possible First Amendment context.

The trial court correctly addressed this issue:

It is a grave mistake, however, to presume that there is a constitutional right to advance frivolous litigation. There is not, of course, any right to engage in baseless litigation. *See Bill Johnson's Restaurants, Inc.*, 461 U.S. 731, 103 S.Ct. 2161 (1983):

Although it is not unlawful under the Act to prosecute a meritorious action, the same is not true of suits based on insubstantial claims-suits that lack, to use the term coined by the Board, a "reasonable basis." Such suits are not within the scope of First Amendment protection:

The first amendment interests involved in private litigation-compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts-are not advanced when the litigation is based on **intentional falsehoods or on knowingly frivolous claims**. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.

Bill Johnson's Restaurants, Inc., 461 U.S. at 743, 103 S.Ct. at 2170 [boldface added]. *See also Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (DC Cir. 1981) (Attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of Noerr) and cases cited at footnote 7 by the District of Columbia Circuit Court.

Order Denying Defendants Post-Trial Motions, pp. 9 – 10. The Appellants have presented no persuasive argument as to why baseless litigation should be protected. The supposed "chilling effect" upon meritorious suits if baseless suits are not protected is incoherent; false swearing statutes, common law, ethical cannons, and R.C.P., Rule 11 all approach the issue from a different direction, but each requires a bona fide basis for suit.

There is no public purpose, and certainly no purpose to the judicial system, of fostering baseless litigation.

The Tenth Circuit Court of Appeals addressed this issue neatly:

The First Amendment states: "Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances." The right to petition "is implicit in '[t]he very idea of government, republican in form.'" McDonald v. Smith, 472 U.S. 479, 482 (1985) (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1876)). "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." California Motor, 404 U.S. at 510; see also City of Del City, 179 F.3d at 887.

However, the right to petition is not an absolute protection from liability. In McDonald, petitioner wrote a letter to President Reagan accusing respondent of fraud, blackmail, extortion, and the violation of various individuals' civil rights. Respondent was being considered for the position of United States Attorney but was not appointed. He brought a libel suit against petitioner, who claimed that the right to petition gave him absolute immunity in his statements to the president. The Supreme Court disagreed.

To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

McDonald, 472 U.S. at 485 (citations omitted). The Court affirmed the lower courts in allowing the libel action to proceed. "The right to petition is guaranteed; the right to commit libel with impunity is not." *Id.* See also City of Del City, 179 F.3d at 889 (holding that right to petition is not absolute, and in state employment context, employee must demonstrate that petition for which he was fired involved matter of public concern).

Cardtoonns v. Major League Baseball Ass'n, 208 F.3d 885, 891 (10th Cir., 2000).

While the Appellants claim that there can be no doubt that they were attempting to use government process for its legitimate outcome or result, this argument proves too much - no matter how baseless the claims a party can always claim “well, I wanted the result.” Indeed, Appellants go so far as to claim that the desire for a result entitled them to summary judgment from claims of malicious prosecution. Appellants’ brief, p. 16. If this was the standard, then a party could make with impunity any allegations imaginable, no matter how baseless, so long as it actually desired the result sought in the suit. But desired results do not rationalize the filing of baseless claims and this Court should reject the effort to de-link substance and procedure.

Moreover, the jury could reasonably have found that the Appellant’s failure to dismiss the removal action after the three judge panel hearing combined with the pattern of singling out citizens in Jefferson County for suit such as Dr. Latterell and two others (*infra*, at footnote 6) for a \$2 million suit,¹⁰ coupled with the failure to make amends, by either paying a judgment owed to Dr. Latterell, or by refusing to engage in mediation in this case as found by the trial court, tend to suggest that another purpose was at work. Indeed, the trial court noted these other purposes:

The defendants’ conduct committed with the assistance their business partner and legal counsel was truly reprehensible. It was an attack upon the functioning of county government to gain undue economic advantage. The defendants singled out one volunteer member of the county’s Planning Commission without any basis whatsoever for doing so (as directly admitted by defendant Athey during his testimony at trial) and pursued Mr. Baldau through two utterly frivolous removal actions that subjected the plaintiff to the risk of great pecuniary loss and loss of his career as a high ranking civil servant in the Federal government. The

¹⁰ That suit, filed by Appellants Jonkers and Capriotti and their counsel herein involving Jefferson County citizens who filed an appeal with the BZA over land issues, was dismissed by Judge Wilkes on Dr. Latterell and the two defendants’ motion for summary judgment, which order was not appealed by Jonkers, Capriotti or their counsel. Those citizens, like Mr. Baldau, were selectively targeted through the filing of slap suits.

defendants made no effort whatsoever to make amends for their conduct; indeed, the defendants refused to engage in mediation.¹¹

The Defendants and their same legal counsel and business partner engaged in similar conduct in the past by suing citizens who appealed a LESA scoring (as testified to by Dr. Latterell), and they even attempted to stop Mr. Baldau from recovering his attorney's fees and costs after Baldau I by filing a court action seeking to enjoin Mr. Baldau's legal counsel from negotiating a check issued by the Jefferson County Commission after duly considering and voting upon the same.

While the Defendants did not actually profit from their scheme, had they succeeded the profits would have been enormous: no citizen would dare speak out about the defendants' housing development projects and no volunteer planning commissioner would dare vote against a project, no matter if the project failed to meet the requirements of the county's land-use ordinance, or how injurious to the public, for fear of being charged with malfeasance in office, just as the defendants charged Mr. Baldau. As a result of this case, volunteers will understand that they can continue to serve the public and will only face removal proceedings for the grounds set forth at law – not as a strategy to “win”.

Defendants have pursued SLAPP litigation against other parties and have still not paid the resulting \$100,000 settlement/judgment for their behavior. They are completely lacking in remorse for their conduct; to them, it was apparently part of how they do business.

Order Denying Defendants' Post-Trial Motions, pp. 14 – 15.

In West Virginia, one could well imagine the impact upon the judicial system if baseless suits were protected. False swearing in petitions to family law masters, to name but one area of law, would be epidemic in scale. Your Appellee respectfully posits that there is no area of West Virginia jurisprudence that would benefit by protecting baseless litigation.

Instead, West Virginia law already applies constitutional standards to suits for malicious prosecution. Not only is there no good reason, based upon the evidence at trial and the jury's conclusions, to change the law in this case, but the Court, if it seeks to

¹¹ See Plaintiff's *Motion for Rule to Show Cause and Request for Relief from Order to Mediate* served on October 8, 2008 which relief was granted.

provide constitutional “plus” protections to one type of litigation, risks creating an ambiguous and readily abused rule of law that will foster baseless litigation in other areas of law.

Finally this: elections have meaning. Elected officials appoint qualified citizens to various public boards and commissions, including planning commissions. If voters are dissatisfied with those appointments, they can express their dissatisfaction at the ballot box. But absent a good faith basis to believe that an official has violated W. Va. Code § 6-6-7, a group of activists (not, in this case, even all dissatisfied residents or voters of Jefferson County) should not be allowed to hector local officials (either elected or appointed) out of office with baseless litigation. The toll of such tactics upon our democracy would be to render elections less meaningful and to so burden volunteers with the risk of bankrupting attorney’s fees as to discourage volunteerism. *Powers v. Goodwin*, 170 W.Va. 151, 291 S.E.2d 466 (1982) (“the voters have a legitimate interest in protecting their duly elected officials from being hectored out of office through the constant charge of bankrupting attorneys’ fees on their own personal resources.”) Despite the electorate’s interest in protecting duly elected officials, Appellants make the astounding claim that a removal petition is “not only a use of judicial process, it is also an attempt to influence legislative and executive functions.” Appellant’s brief, footnote 3. Thus we see the Appellant’s real motives exposed: they filed not for the statutory purposes set forth in W. Va. Code § 6-6-7 – but, just as the trial court found, they filed their baseless removal petitions to bend appointed volunteer officials to their will bend or face the choice between resigning (to moot the removal action) or bearing the brunt of potentially bankrupting attorney’s fees with no assurance of reimbursement.

The United States Supreme Court had this to say about such “political expression”:

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972).

C. The Trial Court Did Not Err in Refusing the Appellants' Untimely Motion to Amend Their Pleadings

This case was less than twenty-four hours from trial when, on December 8, 2008 during the pretrial conference, the trial was continued by Judge Steptoe on the humanitarian basis that defendant Capriotti's sister's funeral was to take place the following day on December 9, 2008 – which was scheduled to be the first day of trial. It was that very morning that defendants filed the motion to amend their pleadings.

This case had been pending since October 5, 2007. The Appellants answered the Complaint on November 9, 2007. A *Scheduling Order* entered on November 20, 2007, to which the Defendants did not object, required that amendments to the pleadings were to have been filed not later than nine (9) months before trial, *i.e.*, March, 2008. **Critically, the deadline to complete discovery did not occur for seven months past the deadline**

for amendments to the pleadings, but by the day before trial it had long since expired.

After the time-period for conducting discovery ended, the Plaintiff was granted partial summary judgment on the issue of liability. *See Order Granting Plaintiff's Motion for Partial Summary Judgment*, entered November 18, 2008. In that same Order, Judge Steptoe denied the Defendants' cross-motion for summary judgment which argument was predicated upon the doctrine of *Noerr-Pennington* immunity on four separate grounds including, specifically: "(3) the *Noerr-Pennington* doctrine of immunity has not been recognized in the context of this type of case in West Virginia; and (4) Defendants waived any claim of immunity or qualified immunity by not affirmatively pleading the same in their Answer." *Id.*, p. 5.

In contravention of black letter law, the Appellants hoped to undermine the finality of the judgment entered against them by pleading new theories of defense that would have of necessity if allowed, required discovery to be re-opened.

The Defendants' motion to amend did not cite to any case law or hornbook law in support of the proposition that a motion to amend the pleadings may be granted after judgment has been entered. Presumably,¹² the Appellants wished to rely on R.C.P., Rule 15(a) as the rule predicate for leave to amend their pleadings, notwithstanding the prior entry of judgment against them. However, Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1489 thoroughly explains the issue:

Although Rule 15(a) vests the district court judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when "justice so requires," there is a question concerning the extent of this power once a judgment has been entered or an appeal has been taken. Most courts faced with the problem have held that once a

¹² The Defendants' motion to amend contained no citation to any statute, rule of procedure, or case law.

judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60. The party may move to alter or amend the judgment within ten days after its entry under Rule 59(e) or, if the motion made after that ten day period has expired, it must be made under the provisions in Rule 60(b) for relief from a judgment or order. This approach appears sound. To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the termination of litigation. Furthermore, the draftsmen of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless.

The Appellants did not assert any basis or grounds for why they waited until after the deadline for amendments had long passed, after the deadline for conducting discovery had passed, after judgment had been entered against them, and did not propose these amendments until the eve of a trial. They did not offer any reason at all as to why they could not have timely made these amendments. A similar situation occurred in *Diersen v. Chicago Car Exchange*, 110 F.3d 481 (7th Cir. 1997). In that case, the Court of Appeals held that the district court had not abused its discretion in denying the plaintiff leave to amend the complaint when the motion was not filed until after the court had granted the defendant's motion for summary judgment. In reaching this result, the Court noted that the proposed amendments could and should have been suggested much earlier in the litigation, and allowing amendment would have prolonged the litigation. *Id.*, at 489. *See also* Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1489, 2008 Pocket Part, pp. 127 – 129.

Likewise, in West Virginia Rule 15(a) is not without its limits and numerous West Virginia cases have held that a circuit court does not commit reversible error in denying a motion to amend in the absence of a showing of an abuse of discretion. *See e.g., Poling*

v. Belington Bank, Inc., 207 W. Va. 145, 153, 529 S.E.2d 856, 864 (1999) (motion to amend pleading denied; no abuse of discretion). Generally, the primary purpose of allowing an amendment to the pleadings is to secure adjudication upon the merits of the controversy. That purpose could not be served in this case; the merits of the controversy had already been determined by summary judgment. In this case, the Appellants did not argue any reason at all as to why the post-judgment amendment should be allowed and thus, it cannot be an abuse of discretion to deny such amendment.

Furthermore, the Appellants sought to include two new defenses that it chose not to assert at any reasonable time and instead, waited until one day before trial to request an amendment to the pleadings: 1) the *Noerr-Pennington* doctrine of immunity; and 2) Good faith reliance upon advice of counsel. Both of these defenses are highly fact-intensive and, had they been asserted timely, would have been the subject of intensive discovery by the Appellee.

For example, in order to overcome the immunity conferred by the *Noerr-Pennington* doctrine, as stated in other jurisdictions, the plaintiff must prove, *inter alia*, the challenged litigation was a “sham” that was **subjectively baseless**. The plaintiff must show that the **defendant harbored a motive to subvert the legal process for wrongful ends**. See *Defendants’ Response to Plaintiff’s Motion for Summary Judgment and Cross Motion for Summary Judgment*, pp. 5 – 6. The inquiry into the defendants’ subjective state of mind and intent to subvert legal process is necessarily fact intensive that, to be fair to the plaintiff in discovery, would have required extensive questioning of the defendants. Ironically as it turned-out at trial, the Appellants did get to put on abundant

evidence of their state-of-mind and the Appellee had to deal with it at trial. Thus, in a very real sense this assignment of error is moot.

Likewise, the defense of a good faith reliance upon advice of counsel requires proof by the party asserting this defense that he: (1) made a complete disclosure of the facts to his attorney; (2) requested the attorney's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied upon the advice in good faith. *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 326, 547 S.E.2d 256, 264 (2001). The Appellants disingenuously assert that “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.” Appellants’ brief, p. 21. It is difficult to conjure how the Appellee could have had ample time to address the four *Sheetz* factors after the close of discovery and at the time the proposed amendment was asserted, less than twenty-four hours from trial.

Because these defenses were not asserted by the Appellants at any time prior to summary judgment, the Appellee made no inquiry through discovery about the elements of these defenses.

In effect, the Appellants were asking for a “do-over” of this entire case. Yet the Appellants ignore the body of case law addressing waiver. It is black letter law that substantive rights and affirmative defenses can be waived (e.g., right to a jury trial, etc.) and the failure to timely assert a right or defense can, and in this case does, constitute a waiver. As the Fourth Circuit has said: “Thus the Noerr-Pennington doctrine, as it has evolved, is an affirmative defense which exempts from anti-trust liability any petitioning activity designed to influence legislative bodies or governmental agencies. *See California*

Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-511, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972).” *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F2d 50 (4th Cir. 1981). In the absence of a statute forbidding waiver, the notion that a right or an affirmative defense cannot be waived is simply inconsistent with black letter law.

D. The Circuit Court Did Not Err in Granting Partial Summary Judgment

The removal petitions alleged that Baldau “committed multiple acts of official misconduct, malfeasance in office, incompetence and neglect of duty....” Petition, ¶ 8.

“Misconduct in office is any unlawful behavior by a public officer in relation to the duties of his office, wilful in character.’ Point 2, Syllabus, *Kesling v. Moore and Cain*, 102 W.Va. 251, 135 S.E. 246 [1926].” Syllabus Point, *Daugherty v. Day*, 145 W.Va. 592, 116 S.E.2d 131 (1960). “Malfeasance in office has been defined as ‘the doing of some act which is positively unlawful or wrongful or an act which the actor has no legal right to do, or as any wrongful conduct which affects, interrupts or interferes with the performance of official duty.’ *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E.2d 33 (1956).” *Kemp v. Boyd*, 166 W.Va. 471, 485, 275 S.E.2d 297, 306-07 (1981).

In Re Petition to Remove John G. Sims, 206 W.Va. 213, 221, 523 S.E.2d 273, 281 (1999).

Upon these issues the three judge panel made dispositive findings in its Conclusions of Law:

- Paragraph 16 - in the exercise of his duties as one of nine members of the planning commission Baldau “has obviously acted in good faith, and within the law, as he exercised his votes,

aforementioned, in accordance with...the advice of JCPC's counsel, and his rights, duties and obligations therein established.”;

- Paragraph 17 - the votes of other members of the JCPC were, in most instances, the same as Baldau's votes; “however, only the Respondent has been singled out for removal by the Petitioners. No reasonable, logical or rational explanation was presented by the Petitioners as to why they seek to remove only the Respondent from the JCPC”; and,
- Paragraph 19 - “There is not a scintilla of evidence in this case to support any of the allegations within the Petition that the Respondent, in the performance of any of his duties as a member of the JCPC or at the Jefferson County Public Service meeting...violated the law or his oath of office...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 Jefferson County Planning Commission, committed multiple acts of official misconduct, engaged in malfeasance in office, is incompetent or has neglected any of his official duties.”

As this Court might observe, in terms of proof, failing to adduce even a “scintilla of evidence” to support one's claims throughout an entire trial is the hallmark of a baseless cause of action. Indeed, as the trial court found based upon the three judge panel decision: “In short, not only was Mr. Baldau completely exonerated, but it was

“obvious”, *e.g.*, easily discovered, seen, or understood that there was no basis in fact whatsoever for the defendants to have filed the removal actions.

Remarkably and despite these findings, the Appellants contend that even Appellant Capriotti’s deposition testimony as to his utter and total lack of any knowledge whatsoever to support the claims he verified under oath is insufficient to prove his knowledge and intent. Appellants’ brief, p. 30. Such obstinacy begs the question of how there can be either a subjective or objective good faith basis to assert misconduct and malfeasance, *inter alia*, when the Petitioner himself cannot testify as to, among other things, any inappropriate or improper act by Baldau? The real answer is that these claims were completely contrived in order to accomplish an illegitimate purpose – the hectoring out of office of any public official who did not acquiesce to the Appellants’ demands. By so doing, and as now admitted by the Appellants, they could not only make use of judicial process to force off the Planning Commission someone whom they did not like, but also “influence” legislative and executive functions.

“To maintain an action for malicious prosecution it is essential to prove: (1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff.” Syl. pt. 1, *Lyons v. Davy-Pocohontas Coal Co.*, 75 W.Va. 739, 84 S.E. 744 (1915); *Finney v. Zingale*, 95 S.E. 1046 (W.Va. 1918); *Preiser v. MacQueen*, 177 W.Va. 273, 275, 352 S.E.2d 22, 24 (W.Va., 1985) *citing Van Hunter v. Beckley Newspapers Corporation*, 129 W.Va. 302, 40 S.E.2d 332 (1946).

In their response to the motion for partial summary judgment the Appellants only assertions of fact were the very same assertions that had been expressly rejected by the three judge panel. *See e.g.*, Defendants’ Response to Plaintiff’s Motion for Summary

Judgment and Cross Motion for Summary Judgment, pp. 7 – 8. As the Appellants had not appealed the findings of the three judge panel, and they had not developed any additional facts through discovery, or submitted any affidavits to place in dispute any material facts upon which the summary judgment motion was based, the grant of summary judgment was justified under R.C.P., Rule 56.

Contrary to the Appellant’s claim, the trial court correctly granted partial summary judgment on the issue of inferred malice because there remained no genuine issue of material fact as to each of the elements of the tort of malicious prosecution. Moreover, as the trial transcript shows, Appellants did in fact get to relitigate at trial the entire removal petition case as well as testify about their supposed “state of mind” at the time they filed the removal petitions. Thus, there is no error.

E. Damages are Warranted by both the Facts and the Law

1. Compensatory damages for Emotional Distress are Available at Law

The Appellants argue throughout their appeal that they were engaged in constitutionally protected activity when they filed their removal petitions. However, in arguing against general compensatory damages they want this Court to hold that in malicious prosecution actions damages are limited and distinct from those that can be awarded in other First Amendment contexts, such as libel and defamation. There is no compelling reason to limit damages in this arbitrary manner.

In syllabus point 5 of *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984) this Court held:

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

In this case, there was abundant evidence of the emotional distress caused by, among other things, the public humiliation brought about by the baseless charges [Trial tr., Day 2, pp. 18, 21], the stress caused by the nature of the charges themselves in that Mr. Baldau was obligated by departmental policy to report the charges to the Justice Department and the consequent fear for his and his family's well being if the charges or their resolution caused the loss of his security clearance and his potential removal from his career federal employment. Trial tr., Day 1, p. 270. Baldau was unable to sleep well and was having difficulty at work as a result. Trial tr., Day 1, pp. 130 – 131. Both Mr. Baldau's wife and a family friend [Trial tr., Day 2, pp. 14 -15] were so alarmed by Baldau's state of mind that they urged psychological counseling for Baldau to which he eventually agreed. Trial tr., Day 1, p. 138, 144. Baldau was extremely concerned when he learned that the prosecuting attorney's office would not represent him in these removal actions [Trial tr., Day 1, p. 159] and, in order to protect his reputation and career, he had to hire legal counsel at his own expense, using money he did not have to spend [Trial tr., Day 1, p. 163], with no assurance whatsoever of reimbursement from the Jefferson County Commission. Trial tr., Day 1, p. 129. The accusation that Baldau had intentionally broken the law was in and of itself particularly galling because Baldau has devoted his entire professional career to the justice system itself. Trial tr., Day 1, p. 162.

In addition to the emotional upset and anguish that the Appellants caused Baldau, he also presented evidence to the jury of \$2,684.62 of out-of-pocket costs. Trial tr., Day 1, pp. 187 – 189.

In cases arising under the First Amendment general compensatory damages for emotional distress have been affirmed by this Court. *See Estep v. Brewer*, 192 W.Va. 511, 453 S.E.2d 345 (W.Va., 1994) (libel case affirming award of \$150,000 for emotional distress, \$50,000 for damage to reputation, and \$50,000 for punitive damages); *Pote v. Jarrell*, 412 S.E.2d 770, 186 W.Va. 369 (W.Va., 1991) (malicious prosecution action in which an award of \$12,000 compensatory damages [it appears this included \$8,348 of attorney's fees] and \$35,000 punitive damages was affirmed).

The Appellants should not be heard to both claim constitutional protection while at the same time assert that they cannot be held responsible for damages caused when they act with actual malice as found by the jury in this case.

2. Punitive Damages

The Appellants claim that once the compensatory damage award is stricken, an award of punitive damages exceeds constitutional limits. First, the award for general compensatory damages should not be reversed. But even if it was, actual damages were awarded in the amount of \$2,700. Second, the Appellants requested that the verdict form be structured so that the punitive damages awarded would be awarded individually as against each of the Appellants separately, not jointly. As a result, even if only the actual damages, and not the general damages, are measured against each individual punitive

damages award, the ratio only slightly exceeds 5:1, before calculating prejudgment interest.¹³

The Appellants' contention that Baldau was not financially vulnerable is specious; there was no assurance that attorney's fees and costs would be reimbursed and in fact, they were not reimbursed until about a year after they were first incurred.

The Appellants claim there was no malice, but still offer no rational reason why Baldau was singled-out. They ignore the findings of the three judge panel and the jury; they refused to stop the process despite a polite invitation to do so; they refused to mediate; they targeted others for suit; refused to pay a judgment; and now they admit that the removal petitions had other purposes – essentially to serve as an *in terrorem* threat to those with legislative or executive responsibilities who might not acquiesce to the Appellants' demands. Appellee contends that the award of punitive damages in any ratio is justified by the overt actual malice exhibited by the Appellants. *See e.g., Order Denying Defendants' Post-Trial Motions*, pp. 14 – 15.

3. The Trial Court Did Not Err in Awarding Attorney's Fees and Costs

The Appellants concede that there is authority for awarding attorney's fees and costs. The Appellants did not contest below or here either the hourly rate or number of hours sought by the Appellee.

Instead, against all record evidence, including the three judge panel's decision as well as the jury's decision, the Appellants contend that there were no "false facts." To be more accurate Appellant Capriotti should have said there were no facts at all of which he was aware despite notwithstanding his verification falsely sworn; Appellants Athey and

¹³ Prejudgment interest accrues at the rate of 10% calculated from July 19, 2006 until April 25, 2009 upon \$2,700 in actual damages. *Judgment Order*, p. 5.

Jonkers should have said that despite being present at the various planning commission hearings at issue and having had transcripts made of the same, they still alleged false facts as to who said what and as to who drafted and signed documents, and should have told the courts below that they were seeking to remove Baldau for following the legal advice given to the Planning Commission by their own attorney when he was representing the Planning Commission. But repeated baseless allegations and lawsuits filed without a scintilla of evidence must have consequences and one of those consequences is accepting responsibility for attorney's fees and costs.

WHEREFORE, Todd Baldau respectfully requests that the jury's verdict and the judgment of the Circuit Court of Jefferson County be affirmed. Appellee further requests that this matter be remanded to the Circuit Court of Jefferson County for an award of fees and costs incurred as a result of this appeal.

Dated this the 24th day of August, 2010.



David M. Hammer, Esq.

WV Bar I.D. # 5047

Robert J. Schiavoni, Esq.

WV Bar I.D. #4365

HAMMER, FERRETTI & SCHIAVONI

408 West King Street

Martinsburg, WV 25401

(304) 264-8505

Counsel for Todd Baldau

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

Petitioners,

vs.

Appeal No (to be assigned)

TODD BALDAU,

Respondents.

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 Delivery
Date of Service:	August 25, 2010
Persons served and address:	J. Michael Cassell, Esq. James P Campbell, Esq. Campbell Flannery 201 N George St Suite 202 Charles Town, WV 25414 jcassell@cmzlaw.com
Item(s) Served:	Response of Appellee


David M. Hammer