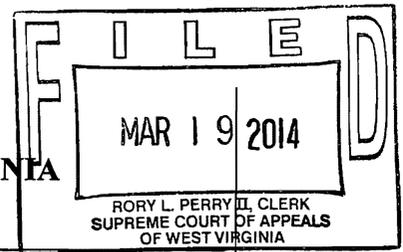


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

CASE NO. 14-0279

STATE OF WEST VIRGINIA EX REL. CITY OF WEIRTON,

Petitioner,

v.

DAVID J. SIMS, JUDGE OF THE  
CIRCUIT COURT OF BROOKE COUNTY,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Counsel for the Petitioner  
Thomas E. Buck, Esquire  
W.Va. Bar ID #6167  
BAILEY & WYANT, P.L.L.C.  
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## **II. QUESTIONS PRESENTED**

1. Does taking the discovery deposition of plaintiff's lawyer regarding the substance of pre-suit settlement negotiations between the parties' attorneys violate the general rule that such evidence of unsuccessful settlement negotiations is not admissible evidence?
  
2. Will allowing the deposition of an attorney regarding pre-suit settlement

negotiations have a chilling effect on future settlement negotiations throughout the State?

3. Will allowing such a deposition violate the well-established public policy favoring settlement by negotiations.

### **III. STATEMENT OF THE CASE**

This is an employment case. The plaintiff below, Terry DiBacco, was a City of Weirton Police Officer. He began to have mental health problems for which he was treated by multiple mental health practitioners. Plaintiff was ultimately placed on administrative leave on April 16, 2009, based upon the recommendations of his mental health physicians while on administrative leave. He received full pay. Also while on leave, plaintiff retained an attorney, Dean Makricostas<sup>1</sup> to represent him in this employment dispute. The City of Weirton had legal counsel as well. Specifically, the City retained Vince Gurrera. Dean Makricostas and Vince Gurrera attempted negotiations regarding conditions necessary to return plaintiff to work. These negotiations ultimately failed.<sup>2</sup> Plaintiff did not return to work.

Terry DiBacco applied for disability and received the same. The disability claimed by plaintiff in his disability application is the same identified by the mental health physicians. He has been on disability since February 27, 2011.

The plaintiff obtained new counsel who currently represents him in this case. Plaintiff has now brought a Civil Action against the City of Weirton claiming he was not put back to work due to perceived disability.<sup>3</sup> The plaintiff now seeks to take the deposition of Dean Makricostas,

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<sup>1</sup> See: Deposition testimony of plaintiff Page 39-40 attached hereto as *Exhibit B*.

<sup>2</sup> These negotiations are the subject of this Petition for Writ of Prohibition.

<sup>3</sup> The plaintiff also brought suit against the Board of Trustees of the Policeman's Pension or Relief Fund of the City of Weirton, Inc. This is the entity that approved his disability

his former attorney. The specific stated purpose for this deposition is to discover precisely what was said during settlement negotiations between Vince Gurrera and Dean Makricostas. The City of Weirton objects to discovery regarding prior settlement negotiations.

The plaintiff subpoenaed Dean Makricostas. Thereafter, on January 24, 2014, the defendant, City of Weirton, filed a Motion for Protective Order and Motion to Quash Subpoena.

This Motion was denied by the Court's Order dated March 6, 2014. This Order is attached as Exhibit A. Thereafter, the defendant filed the subject Petition for Writ of Prohibition seeking to prevent the deposition of plaintiff's former attorney with respect to pre-suit settlement negotiations.

#### **IV. SUMMARY OF ARGUMENT**

The plaintiff below, a City Police Officer, was on administrative leave for diagnosed mental health conditions. While on leave he retained an attorney who negotiated with the City Attorney in an attempt to resolve the dispute over plaintiff's employment and have the plaintiff return to work. The settlement negotiations were unsuccessful. The plaintiff below ultimately applied for and is currently receiving disability pension benefits due to his mental health conditions. Despite applying for and receiving disability benefits, plaintiff now sues the City of Weirton for not returning him to work. He also has sued the Pension Fund which granted his request for disability benefits. Plaintiff below seeks to depose his former attorney for the sole purpose of obtaining testimony regarding the substance of settlement negotiations between his attorney and the City's attorney. The Petitioner contends that such discovery regarding

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claim.

unsuccessful pre-suit negotiations is violative of the Rules of Evidence, the Rules of Civil Procedure and the public policy of this State and, therefore, this deposition should not proceed.

Specifically, Rule 408 of the West Virginia Rules of Evidence prevents this type of evidence from being used to establish liability as plaintiff intends. Additionally, Rule 26(b)(1) of the Rules of Civil Procedure prohibits such discovery not reasonably calculated to lead to the discovery of admissible evidence. Further, allowing a new attorney to cross-examine a prior attorney regarding what was said during prior settlement negotiations will have a chilling effect on free communication involving settlements. This would violate the well-established public policy of the State that encourages settlement negotiations.

#### **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner contends that oral argument is necessary under W.V.R.A.P 18. Petitioner further contends that argument should be set pursuant to W.V.R.A.P. 19(a)<sup>4</sup>. In particular this case involves an assignments of error in the application of settled law and further, claims an unsustainable exercise of discretion where the law governing that discretion is settled.

The Petitioner agrees that this case is appropriate for a Memorandum Decision.

#### **VI. ARGUMENT**

##### **A. WRIT OF PROHIBITION STANDARD**

The petitioner seeks a writ of prohibition to halt enforcement of the Circuit Court's Order permitting the deposition of the plaintiff's former attorney regarding settlement negotiations.

Thus, petitioner is seeking to invoke the original jurisdiction of this Court pursuant to Rule 16 of

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<sup>4</sup> Also, W.V.R.A.P. 20 argument is appropriate because this seems to be a case of first impression with respect to deposing a former attorney and encouraging settlement is a fundamental public purpose.

the West Virginia Rules of Appellate Procedure. The legal standard for issuing a writ of prohibition is often stated as follows:

In determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the court will examine five factors: 1. Whether the party seeking the writ has no other adequate means such as a direct appeal, to obtain the desired relief; 2. Whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; 3. Whether the lower tribunal's order is clearly erroneous as a matter of law; 4. Whether the lower tribunal's order is an often repeated error or manifests persistent disregard for either procedural or substantive law; and 5. Whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

*State ex rel. AIG Domestic Claims, Inc., v. Starcher*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2014 W.Va. LEXIS 159 (2014), citing with approval *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2<sup>nd</sup> 12 (1996). Accord: *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010).

**B. PETITIONER HAS MET THE STANDARDS FOR ISSUING A WRIT OF PROHIBITION**

The essential elements have been squarely met in this case. Specifically, elements one, two and three have been met.<sup>5</sup>

The petitioner has no other adequate means to be protected from the results of allowing this deposition to proceed forward and the petitioner will be damaged and prejudiced in a way that is not correctable on appeal. Further, the Order contradicts the rules of discovery and

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<sup>5</sup> Arguably, Element No. 5 has also been met as no case law has been found in West Virginia where a plaintiff's attorney seeks to depose prior counsel regarding the substance of unsuccessful pre-suit settlement negotiation with the intent to use such information at Trial.

evidence and violates this State's public policy.

It is clear that a writ of prohibition is proper and appropriate to prevent an improper discovery deposition. *State ex rel. Massachusetts Mutual Life Insurance Company v. Sanders*, 228 W.Va. 749, 724 S.E.2d 353 (2012); *State ex rel. Paige v. Canady*, 197 W.Va. 154, 475 S.E.2d 154 (1996). In *State ex rel. v. Paige*, the Court found it appropriate to grant a writ of prohibition with respect to taking the deposition of highly placed government officials. In the *Massachusetts Mutual* case, the Court addressed depositions of high ranking corporate officials in the context of a Petition for Writ of Prohibition. *Id.* This Court pointed out that “regarding discovery orders, this court has previously held that a writ of prohibition is available to correct the clear legal error resulting from a trial court’s substantial abuse of its discretion in regard to discovery orders.” *Id. Quoting: State ex rel. State Farm Mut. Auto. Ins. Co., v. Bedel*, 226 W.Va. 138, 143, 697 S.E.2d 730, 735 (2010) quoting, in part Syl. Pt. 1 *State Farm Mut. Auto Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992). In *Massachusetts Mutual*, this Court granted a writ of prohibition with respect to discovery depositions that were not consistent with the *Apex* deposition rule.

In this present case, the Petitioner requests the Court issue a writ of prohibition to prevent a discovery deposition that is not consistent with the rules regarding the admissibility of settlement negotiations and public policy favoring resolution of disputes by settlement.

This Court has further held that “when a discovery order involves the probable invasion of confidential materials that are exempt from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court’s original jurisdiction is appropriate.” Syl. Pt. 4. *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998) quoting Syl. Pt. 3 *State ex rel. USF&G v. Canady*, 194 W.Va. 431, 460 S.E.2d 677

(1995). The petitioner herein has alleged that plaintiff's effort to seek evidence regarding pre-suit settlement negotiations is not reasonably calculated to lead to the discovery of admissible evidence as set forth in Rule 26(b)(1) of the West Virginia Rules of Civil Procedure. To the contrary, the deposition sought is of an attorney for the sole purpose of obtaining testimony regarding substance of an alleged offer made during pre-suit negotiations. This is precisely the type of discovery that is appropriate for review and correction by writ of prohibition.<sup>6</sup>

Moreover, this Court has held that a writ of prohibition is proper when the discovery is unduly burdensome. *See: State Farm v. Stephens*, 188 W.Va. 622, 65 S.E.2d 577 (1992). Further, the issue of whether the evidence sought is relevant and/or reasonably calculated to lead to the discovery of admissible evidence is a proper issue to be considered for a writ of prohibition. *Id.* 188 W.Va. at 583, 425 S.E.2d at 628. This precise argument is made in the present case.

The deposition cannot be undone once it is taken. Once plaintiff has had the opportunity to cross-examine the attorneys regarding pre-suit settlement negotiations, all protections for those communications are lost. A subsequent appeal does nothing to put the "cat back into the bag." There is one and only remedy and that is to prevent the deposition. Simply excluding the evidence from Trial will not prevent the harm. The harm is allowing the attorneys to be cross-examined regarding settlement negotiations. As set forth below, settlement is favored as a matter of public policy in this state. Attorneys function in negotiations with a belief and understanding that they can openly negotiate without fear of having their words used against them if negotiations are unsuccessful. If attorneys know they are subject to cross-examination regarding any and all aspects of pre-suit settlement negotiations, this will certainly have a chilling effect on

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<sup>6</sup> Plaintiff below has not represented that he is waiving the attorney/client privilege. If he refuses to do so, this is yet another reason the deposition is inappropriate.

those negotiations in the future. Indeed, this is the very reason why this type of deposition is not permissible. This is the very reason why evidence of negotiations, generally, is neither admissible nor discoverable.

C. **THE EVIDENCE SOUGHT VIOLATES W.V.R.E. 408 AND W.V.R.C.P. 26(b)(1)**

West Virginia Rule of Civil Procedure 26(b)(1) provides in pertinent part, that discovery must be reasonably calculated to lead to the discovery of admissible evidence. It is completely inappropriate under the rules to pursue a course of discovery that is only calculated to lead to the discovery of **inadmissible** evidence. This is precisely what the plaintiff below seeks to achieve in the present case. He wants to take the deposition of a lawyer regarding patently inadmissible evidence. West Virginia Rule of Evidence 408 clearly and unequivocally provides that evidence of any offers, promises, or attempts to compromise a claim or dispute is inadmissible to prove liability. The rule further expressly provides “**evidence of conduct or statements made in compromised negotiations is likewise not admissible.**” *Id.* (emphasis added). The sole purpose of the proposed deposition is to gather evidence of statements allegedly made during compromised negotiations. This Court has repeatedly held that such evidence is inappropriate.

When a company offered to restore water to a plaintiff’s home this evidence was properly excluded, as it was in evidence of an offer of settlement under Rule 408. *Schartiger v. Land Use Corporation*, 187 W.Va. 612, 617, 420 S.E.2d 883, 888 (1992). When the plaintiff attempted to introduce proof of settlement negotiations the same was properly excluded by the Trial Court. *Allegheny Development Corp. Inc., v. Barati*, 166 W.Va. 218, 273 S.E.2d 384 (1980). When plaintiff attempted to introduce statements of an insurance adjuster to establish evidence of an offer of compromise the same was properly excluded. *McMillen v. Dettore*, 161 W.Va. 346, 350-351, 242 S.E.2d 459, 463 (1978). Indeed, there are a plethora of cases that stand for the

proposition that offers of settlement and settlement negotiations cannot be used against the party making such offers or engaging in such settlement negotiations. *See generally: Allegheny Development Corp. Inc. v. Barati*, 166 W.Va. 218, 273 S.E.2d 384 (1980); *Howell v. McCarty*, 77 W.Va. 695, 88 S.E.2d 181 (1916); *Lively v. Rufus*, 533 S.E.2d 622, 207 W.Va. 436 (2000); *Light v. Allstate Ins. Co.*, 48 F.Supp.2d 615 (1998); *Eur Energy Resources Corp. v. S&A Property Research, LLC*, 720 S.E.2d 163, 228 W.Va. 434 (2011). For these reasons, the deposition of the former attorney should not be permitted.

**D. ALLOWING THE DEPOSITION UNDERMINES THE PUBLIC POLICY FAVORING SETTLEMENT NEGOTIATIONS**

There is a clear and strong public policy in the State of West Virginia that favors settlements. *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720 (2004); *Riggle v. Allied Chemical Corp.*, 180 W.Va. 561, 378 S.E.2d 282; *Reager v. Anderson*, 176 W.Va. 691, 371 S.E.2d 619 (1988), citing *Sanders v. Rose Lawn Memorial Garden, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968) (“the law favors and encourages the resolution of controversies by contract of compromise and settlement rather than by litigation.”); *State ex rel. Verizon v. Matish*, 203 W.Va. 489, 740 S.E.2d 84 (2013); *EurEnergy Resources Corp. v. S&A Property Research, LLC*, 720 S.E.2d 163, 228 W.Va. 434 (2011).

There is no dispute in this case that the two parties through their counsel met and attempted to reach a settlement agreement prior to suit. Although unsuccessful, these are the very type of settlement negotiations that the public policy of the State of West Virginia encourages.

The law favors settlement and settlement negotiations. Attorneys function with the understanding that what they say during settlement negotiations is generally not admissible. Knowing this rule allows attorneys to speak freely during settlement negotiations to explore settlement potential. If the threat of subsequent cross-examination looms in the minds of lawyers,

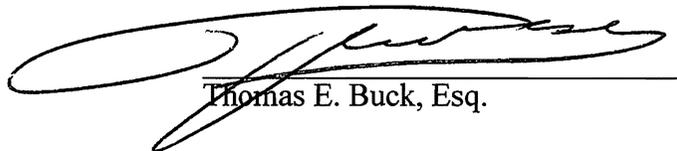
then negotiations will become hampered and restricted. Attorneys will know in the back of their minds that whatever they say or whatever they do, will be subject to the armchair quarterbacking of subsequent lawyers. This thought process stands in sharp contradiction to the public policy of this state that encourages settlement and settlement negotiations. The danger of this chilling effect is very clear. Any evidence plaintiff would like to gain from this deposition is of *de minimis* value when compared to the damage to the settlement process that will result. This is particularly true when the evidence plaintiff seeks is patently inadmissible. Accordingly, a writ of prohibition should issue prohibiting the new plaintiff's attorney from cross-examining prior plaintiff's attorney regarding what was said during unsuccessful pre-suit negotiations.

### **CONCLUSION**

The West Virginia Rules of Civil Procedure prohibit this deposition. The West Virginia Rules of Evidence prohibit this deposition. The Public Policy of the State favoring settlement negotiations prohibits this deposition. Accordingly, a writ of prohibition should be issued prohibiting this deposition.

### **VERIFICATION**

The undersigned verifies that the information contained in the foregoing Petition for Writ of Prohibition is true and correct to the best of his knowledge.

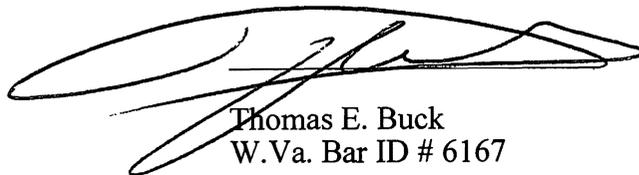
  
Thomas E. Buck, Esq.

**CERTIFICATE OF SERVICE**

Service of the foregoing **PETITION FOR WRIT OF PROHIBITION** was had on the following by mailing a true and correct copy thereof by United States mail, postage prepaid, this 17<sup>th</sup> day of MARCH, 2014:

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STEPTOE & JOHNSON  
P.O. Box 150  
Wheeling, WV 26003



Thomas E. Buck  
W.Va. Bar ID # 6167

**IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA,**

**TERRY DIBACCO,**  
Plaintiff,

v.

**CIVIL ACTION NO. 11-C-50**  
Judge David J. Sims

**CITY OF WEIRTON, WEST VIRGINIA, and  
THE BOARD OF TRUSTEES OF THE POLICEMEN'S  
PENSION OR RELIEF FUND OF  
THE CITY OF WEIRTON, INC.**  
Defendants.

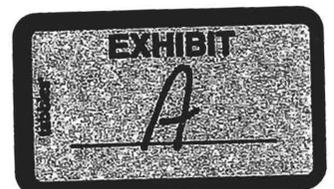
**ORDER**

On the 30<sup>th</sup> day of January 2014, the above styled matter came before the Court on Defendant, City of Weirton's, Motion for Protective Order and Motion to Quash Subpoena. Plaintiff appeared by counsel, Timothy Cogan, Esq., Defendant, City of Weirton (hereinafter "the City"), appeared by counsel, Thomas E. Buck, Esq., and Defendant, the Board of Trustees of the Policemen's Pension or Relief Fund of the City of Weirton (hereinafter "the Board"), by counsel, James Wright, Esq.

The Court, having previously reviewed the parties' filings, did entertain argument of counsel. The Court makes the following findings of facts and conclusions of law.

**FINDINGS OF FACT**

- 1) Plaintiff's claims in this matter are employment and disability related.
- 2) The trial date in this matter is set for July 7, 2014, with discovery to be completed by May 7, 2014.
- 3) Plaintiff was hired as a police officer for the City in July of 1993.
- 4) Plaintiff alleges that he was placed on administrative leave in April 2009.



5) One of the main issues in this matter is what type of release, “medical” or “mental”, was required to be provided by Plaintiff before he would be permitted to return to work as a police officer by the City.

6) The City’s asserts that Plaintiff never submitted a “mental” release to return to work after being put on administrative leave.

7) The City contends that since an independent medical examination (“IME”) identified that Plaintiff had mental health issues that Plaintiff should have secured a “mental” release from a mental health professional before returning to work.

8) Plaintiff testified in his deposition that during a conversation with Vince Gurrera, Esq., the City’s attorney, and Dean Makricostas, Esq., then Plaintiff’s attorney, both Plaintiff and his wife, heard Mr. Gurrera indicate that all the City needed for him to be able to return to work was a “medical” release.

9) Plaintiff disputes that he was ever required by the City to provide a “mental” release to return from administrative leave and contends that he did provide a general “medical” release from his attending physician.

10) Plaintiff noticed the deposition of Mr. Makricostas for February 1, 2014, which was subsequently re-scheduled for March 3, 2014.

11) Plaintiff seeks to discover by deposition of Mr. Makricostas, confirmation of an statements made by Mr. Gurrera, as the City’s attorney, of what Plaintiff would need to return to work as a police officer.

12) The City contends that Mr. Makricostas’ testimony involves settlement negotiations and is irrelevant and inadmissible pursuant to West Virginia Rule of Evidence 408.

13) Plaintiff denies that a deposition of Mr. Makricostas would solely involve irrelevant and inadmissible evidence.

## CONCLUSIONS OF LAW

1) The issue is whether the alleged statements made by Mr. Gurrera, the City's attorney, are **discoverable**.

2) The Court makes no findings or conclusions at this time as to whether the alleged statements made by Mr. Gurrera are **admissible** under the Rule of Evidence.

3) Rule 26(b) of the West Virginia Rules of Civil Procedure (2010) states, in pertinent part that

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

4) Compromise and offers of compromise under Rule 408 of the Rules of Evidence are generally not admissible.

5) However, Rule 408 does not address the discoverability of compromise or offers of compromise, nor does it define compromise and offers of compromise as **privileged** communications.

6) The Court concludes that without some context in which the statements regarding a release were made, the Court is unable to rule on the admissibility of the statements.

7) There exists in this matter a factual dispute as to what type of release the City was requiring the Plaintiff to produce

8) Based upon that factual dispute, the Court concludes that Plaintiff has articulated a specific reason that there exists the likelihood that admissible evidence will be generated by the deposition.

9) The Court concludes that Mr. Makricostas' deposition may to be taken as part of discovery to determine the ultimate issue of whether any of the evidence is admissible under the Rules of Evidence.

10) The Court concludes that the Rules of Evidence do not preclude the taking of the deposition of Mr. Makricostas.

11) However, the Court may, upon completion of discovery, preclude the admission of the evidence should this matter proceed to trial. It is accordingly

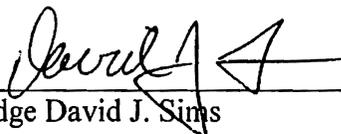
**ORDERED** that the City of Weirton's Motion for Protective Order and Motion to Quash Subpoena shall be and are hereby **DENIED**. It is further

**ORDERED** that the deposition of Dean Makricostas is stayed for thirty (30) days from the date of this Order for Defendants to seek a Writ of Prohibition from the Supreme Court of Appeals, or at least a stay of this Order. It is further

**ORDERED** that the Circuit Clerk of Brooke County shall provide an attested copy of this Order to counsel for the parties.

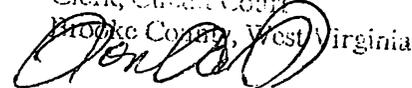
To which rulings the respective objections of the parties hereto are hereby noted.

ENTER this 6<sup>th</sup> day of March 2014.

  
\_\_\_\_\_  
Judge David J. Sims

I hereby certify that the annexed instrument is a true and correct copy of the original as it is in my office.

Attest Gladys F. Cooks  
Clerk, Circuit Court  
Brooke County, West Virginia



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IN THE CIRCUIT COURT  
OF BROOKE COUNTY, WEST VIRGINIA

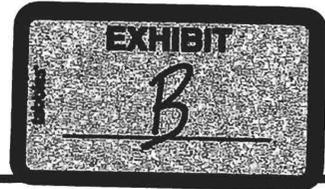
TERRY DiBACCO :  
Plaintiff : CIVIL ACTION NO.  
v : 11-C-50  
CITY OF WEIRTON, WEST VIRGINIA, :  
and BOARD OF TRUSTEES OF THE :  
POLICEMAN'S PENSION OR RELIEF :  
FUND OF THE CITY OF WEIRTON, :  
INC. :  
Defendants :

\* \* \*

Deposition of Terry DiBacco  
Thursday, March 4, 2013

\* \* \*

a plaintiff herein, taken on behalf of the  
defendant, City of Weirton, in the above-entitled  
cause of action pursuant to notice and the  
West Virginia Rules of Civil Procedure by and  
before Tammie Puls, RPR, CLR, and Notary Public  
within and for the State of West Virginia, taken  
at the offices of Cassidy, Myers, Cogan &  
Voegelin, LC, The First State Capitol Building,  
1413 Eoff Street, Wheeling, West Virginia 26003,  
commencing at 10:08 a.m.



1 A. That's what it says here.

2 Q. He also recommended that you see a  
3 neurologist, right?

4 A. Yes.

5 Q. Did you go ahead and see a  
6 neurologist based upon Doctor Clayman's  
7 recommendations?

8 A. Yes, I saw Doctor Singh.

9 Q. Did you undergo any treatment for the  
10 problems identified by Doctor Clayman?

11 A. No, sir.

12 Q. Have you sought any treatment for the  
13 problems identified by Doctor Clayman?

14 A. I went and saw Lou Scott and he said  
15 it was up to me if I wanted to come back. He  
16 thought there was no need to.

17 Q. Did you go back?

18 A. No, sir.

19 Q. So, to the present day, you've never  
20 had any treatment for any of the problems  
21 identified by Doctor Clayman?

22 A. No, sir.

23 Q. Why didn't you obtain treatment for  
24 the problems that Doctor Clayman identified that

1 **made you unfit to return to work?**

2 A. Because the City attorney at the time  
3 was Vince Gurrera, talking to the attorney I had  
4 at the time was Dean Makricostas on a three-way  
5 speaker, myself, my wife, Dean and Vince was on  
6 the phone. Stating that the City, all they  
7 wanted was a medical excuse for me to come back  
8 to work. They did not require me to come back  
9 with a psychological excuse to come back to work,  
10 even after this (indicating) was put out. And  
11 that's why I went and saw Doctor Arora, who is  
12 not a psychologist or a psychiatrist, but my  
13 family doctor. That's when she advised me to go  
14 see the other parties at Ross Park Plaza in  
15 Steubenville.

16 **Q. You received a letter from the City**  
17 **indicating that you should provide a doctor's**  
18 **release to indicate that you could safely return**  
19 **to work, correct?**

20 A. Correct.

21 **Q. And the health issue raised by Doctor**  
22 **Clayman was mental health issues, right?**

23 A. That's what he says.

24 **Q. All right.**

1 THE STATE OF :  
WEST VIRGINIA :  
2 : SS: C E R T I F I C A T E  
COUNTY OF OHIO :  
3  
4

5 I, TAMMIE PULS, Notary Public within and  
for the State of West Virginia, duly commissioned  
6 and qualified, do hereby certify that the  
within-named witness, TERRY DiBACCO, was by me  
7 first duly sworn to testify to the truth, the  
whole truth and nothing but the truth in the  
8 cause aforesaid.  
9

10 I do further certify that I am not a  
relative, counsel or attorney of either party, or  
11 otherwise interested in the event of this action.  
12

13  
14 IN WITNESS THEREOF, I have hereunto set  
my hand and affixed my seal of office at  
Wheeling, West Virginia, on the 24th day of  
15 April, 2013.

16  
17 *Tammie Puls*



18 Tammie Puls, Notary  
Public within and for the  
19 State of West Virginia  
20

21 My Commission expires:  
September 22, 2013  
22  
23  
24