

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

**JOHN F. RIST, III,**

**Petitioner,**

**v.**

**In Mandamus/Prohibition  
No. 99-2497**

**HONORABLE CECIL H. UNDERWOOD,  
Governor of West Virginia, and  
ROBERT S. KISS,**

**Respondents.**

**STATE OF WEST VIRGINIA EX REL. RICHARD A. ROBB, *et al.*,**

**Petitioners,**

**v.**

**In Mandamus  
No. 99-2562**

**CECIL H. UNDERWOOD,  
Governor of the State of West Virginia, and  
ROBERT S. KISS,**

**Respondents.**

**BRIEF OF THE WEST VIRGINIA LEGISLATURE  
ADDRESSING THE AUTHORITY AND AUTHORIZATION  
FOR THE CLERKS OF THE HOUSE AND SENATE TO FILE A  
BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS**

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On October 8, 1999, Darrell E. Holmes, the Clerk of the West Virginia Senate, and Gregory M. Gray, Clerk of the House of Delegates, filed with this Court their "Motion of the West Virginia Legislature for Leave to File a Brief as Amicus Curiae" in the above-styled mandamus

actions. On that same date, the movants also conditionally filed a "Brief of the West Virginia Legislature as Amicus Curiae in Support of the Respondents."

On October 12, 1999, the Supreme Court of Appeals made and entered an order in response to the movant's motion. The Court ordered the brief amicus curiae filed. The court further ordered that the movant Clerks file a brief addressing their authority and authorization to file a brief amicus curiae on behalf of the Legislature of West Virginia.

Under ordinary circumstances, in a mandamus action that involves the Legislature as a party, the Speaker and President are the proper officers to represent the interests of the Legislature. This issue was raised before this court in the case of *Common Cause of West Virginia v. Tomblin*.<sup>1</sup> In that case, a mandamus action was brought against the Finance Committee Chairmen of the House and Senate, challenging the constitutionality of a statute that directed the Conferees Committee on the budget to prepare a digest summary of the budget bill. The Court, after noting that the action had been brought against the Committee Chairmen, stated as follows:

We hasten to point out that the proper respondents in this case are the Speaker of the West Virginia House of Delegates and the President of the West Virginia State Senate. However, because: (1) these officers had actual notice; (2) the respondents admitted in open court that had the President and Speaker been named as parties respondent, their answer to the petition and note of argument would be the same as for the respondents actually named; and (3) the issue in this case is ripe for decision, we have decided not to dismiss the entire case in order to make a procedural point. However, in the future, litigants should be careful to bring all cases involving the legislature against the presiding officers of the House and Senate.<sup>2</sup>

It then seems logical that a motion for leave to file a brief as amicus curiae on behalf of the Legislature would be moved by the President of the Senate and the Speaker of the House of

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1. *Common Cause of West Virginia v. Tomblin*, 413 S.E.2d 358, 404, 186 W.Va. 537, 539, note 2, (W.Va. 1991).

2. *Id.*, at 404.

Delegates. However, in the instant case, the Speaker of the House of Delegates is a respondent in the action. It would seem rather incongruous for the Speaker of the House to file responsive pleadings in an action and also move to file, contemporaneously, a brief amicus curiae. Yet the instant case presents issues for decision that may have significant impact on the legislative branch of government into the future. For this reason, the President of the Senate and the Speaker of the House of Delegates concluded that the legislative position on the issues involved in this case should be heard, and directed the clerks of the respective houses to submit a brief amicus curiae. *See*, Amicus Exhibits 1 and 2, attached hereto.

In at least one instance, an amicus brief was filed in a mandamus proceeding by the minority leader of the House of Delegates. In the case of *Brotherton v. Blankenship*,<sup>3</sup> the Court gave the following description of the amicus participant:

[T]he brief Amicus curiae of Honorable George H. Seibert, Jr. *as a member and Minority Leader of the House of Delegates of West Virginia, and as a citizen and taxpayer of the State*, and upon the reply brief of the relators, this case was submitted for decision. [Emphasis added.]<sup>4</sup>

Apparently, the position of a person as a member of the Legislature, as an elected officer of the Legislature or as an employee of the Legislature is not significant in determining whether that person has standing to bring a mandamus action. It is enough that the person is a citizen and taxpayer. And apparently the same criteria are applied in determining whether a person can properly file a brief as friend of the court.

We do not feel compelled to determine what standing William T. Brotherton, Jr., or Lewis N. McManus may have in their official capacities as President of the Senate and

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3. State ex rel. Brotherton v. Blankenship, 214 S.E.2d 467, 158 W.Va. 390, (W.Va. 1975).

4. *Id.*, at 473.

Speaker of the House. Any standing which could be demonstrated in this regard, either through the role of the Senate in the confirmation process or through the role of the House of Delegates in its consideration of appropriations, is superfluous. Both of these relators have standing to maintain the proceeding as citizens and taxpayers of this State.

We have faithfully adhered to the principle that a citizen and taxpayer may maintain a mandamus proceeding to compel any public officer to perform a nondiscretionary legal duty. *State ex rel. Brotherton v. Blankenship*, W.Va., 214 S.E.2d 467 (1975); *Delardas v. County Court*, 155 W.Va. 776, 186 S.E.2d 847 (1972). No special or pecuniary interest must be shown by individuals who sue in this capacity. *Frantz v. County Court*, 69 W.Va. 734, 73 S.E. 328 (1911).<sup>5</sup>

From the above-cited authorities, it seems clear that the Clerks of the House and Senate are appropriate persons to file an amicus brief in this action. This is reinforced in rule 19 of the Rules of Appellate Procedure, which reads in appropriate part as follows:

A brief of an amicus curiae may be filed by leave of court granted on motion or at the request of the court, except that consent for leave shall not be required if the brief is presented by the State of West Virginia or an officer or agency thereof, or by a county of or municipality.

Respectfully submitted,  
Darrell E. Holmes and  
Gregory M. Gray, Movants  
By Counsel

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5. *State ex rel. Brotherton v. Moore*, 230 S.E.2d 638, 640-41, 159 W.Va. 934, (W.Va. 1976).

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**VERIFICATION OF THE PLEADINGS**

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

Gregory M. Gray, the movant named in the foregoing brief, after being first duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be on information, and insofar as they are therein stated to be on information, he believes them to be true.

\_\_\_\_\_  
Gregory M. Gray

The foregoing instrument was acknowledged before me by Gregory M. Gray, this eighteenth day of October, 1999.

My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

## CERTIFICATE OF SERVICE

I, M. E. "Mike" Mowery, counsel for Darrell E. Holmes and Gregory M. Gray, do hereby certify that service of the attached "Brief of the West Virginia Legislature as Amicus Curiae in Support of the Respondents" was had up on the persons listed below by filing true copies thereof in the United States mail, postage prepaid, addressed as follows:

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All of which was done this eighteenth day of October, 1999.

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