

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Barbara Banister,
Petitioner Below, Petitioner**

vs) **No. 11-1655** (Preston County 11-C-157)

**Town of Rowlesburg,
a West Virginia municipal corporation,
and Margaret Schollar,
Respondents Below, Respondents**

FILED

November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Barbara Banister (“Ms. Banister”), by her counsel, C. Paul Estep and Steven L. Shaffer, appeals from the “Order Denying Petitioner’s Appeal of Certification of Election” entered by the Circuit Court of Preston County on November 4, 2011. Respondent, Town of Rowlesburg, appears by its counsel, Sheila Kae Williams. Respondent Margaret Schollar (“Ms. Schollar”) appears by her counsel, Neil A. Reed.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and does not disagree with the decision of the circuit court. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On June 14, 2011, a mayoral election was held in the Town of Rowlesburg, West Virginia. Ms. Banister, who was seeking re-election as Mayor, and Ms. Schollar were both lawful candidates for the office.

On June 21, 2011, the canvass of the election was held with the Rowlesburg Town Council sitting as a canvassing board per West Virginia Code § 8-5-17. Five provisional ballots were cast in the election, all of which were denied by the Town Council and none of which are involved in the instant appeal. The results of the election were publicly declared at the June 21, 2011, Town of Rowlesburg meeting with fifty-six votes cast for Ms. Banister and fifty-nine votes cast for Ms. Schollar, after which the Town Council certified the election results. Ms. Banister did not make a request for a recount within forty-eight hours of the canvass as required under West Virginia Code § 3-6-9(b).

Ms. Banister filed a “Notice of Contested Election” with the Town of Rowlesburg on or about June 24, 2011. She alleged that there were at least four ballots¹ that were cast unlawfully in the mayoral election, although there was no evidence concerning for whom those votes were cast. On July 21, 2011, the Town Council held a hearing on the election contest during which several witnesses testified, including Ms. Banister, concerning the four ballots. Upon a motion, the Town Council voted to go into executive session and, upon emerging from executive session, voted unanimously to reconvene on July 25, 2011, for the propose of removing the four contested ballots and recounting the remaining ballots.

On July 25, 2011, the Town Council reconvened and, upon opening the ballot box, determined that the four ballots could not be identified from all other ballots in the ballot box.² At that juncture, the Town Council went into executive session with its attorney to consider the town’s legal options. Upon emerging from executive session, a motion was made to uphold the original election results and to deny Ms. Banister’s election contest. The motion passed and Ms. Schollar was declared the winner of the mayoral election.

On August 23, 2011, Ms. Banister filed an “Appeal of Certification of Election” in the circuit court pursuant to West Virginia Code § 3-7-7. After the parties briefed the issues below, the circuit court held a hearing on the appeal on October 24, 2011, during which the parties were represented by their respective legal counsel. Thereafter, on November 4, 2011, the circuit court entered an order denying Ms. Banister’s appeal. Her appeal to this Court followed.

Ms. Banister raises several issues on appeal to this Court: that the election was prematurely certified by the Town Council without giving her the statutory forty-eight hour period within which to demand a recount; that the canvass was deficient; that a new election should have been ordered; and that the Town Council violated the Open Governmental Proceedings Act [West Virginia Code § 6-9A-1 through § 6-9A-12] during the election contest proceedings.

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review.”

Syl. Pt. 2, *Walker v. WV Ethics Comm’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

¹ Ms. Banister alleged that three members of the same family wrongfully voted because they reside outside the Rowlesburg corporate limits and that another person, who is not a resident of Rowlesburg, voted on his father’s registration.

² The Town of Rowlesburg states in its appellate brief that “[i]t is apparent that in the future, the training of poll workers must be addressed” Hopefully, such training will take place prior to the next election in the Town of Rowlesburg.

With this standard in mind, the Court has considered the merits of the arguments set forth in the parties' briefs, it has reviewed the designated appendix, and it has reviewed the circuit court's "Order Denying Petitioner's Appeal of Certification of Election" entered on November 4, 2011. We find neither an abuse of discretion nor clear error in the circuit court's order and, therefore, adopt and incorporate by reference the circuit court's findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis
Justice Brent D. Benjamin

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

BARBARA BANISTER,

Petitioner,

v.

Civil Action No. 11-C-157

TOWN OF ROWLESBURG,
a West Virginia municipal corporation, and
MARGARET SCHOLLAR,

Respondents.

ORDER DENYING PETITIONER'S APPEAL OF CERTIFICATION OF ELECTION

On August 23, 2011, the Petitioner,¹ Barbara Banister (Ms. Banister), filed her "Appeal of Certification of Election" pursuant to West Virginia Code § 3-7-7 (1963) (Repl. Vol. 2011) contesting the results of the mayoral election of the Town of Rowlesburg, West Virginia, conducted on June 14, 2011, wherein she received 56 votes for the office of mayor and her opponent, Margaret Schollar (Ms. Schollar), received 59 votes.²

The Court held a pre-trial conference on September 2, 2011, where the parties narrowed the issues and the Court set a briefing schedule on the issues raised by Petitioner's Appeal. (See Order entered September 28, 2011.) Thereafter, Ms. Schollar filed her "Answer to Certification of Election" on September 2, 2011. The Town of Rowlesburg filed its "Answer of Respondent, Town of Rowlesburg" on September 15, 2011. Ms. Banister filed "Contestant's Brief in Support of Election Contest" on September 29, 2011. Ms. Schollar filed her "Brief of Margaret Schollar" on October 11, 2011. The Town of Rowlesburg filed its "Response Brief

¹ The court file contains references to Ms. Banister both as "contestant" and "petitioner."

² West Virginia Code § 3-7-6 (2002) (Repl. Vol. 2011) governs the contest of a municipal election.

of Respondent, Town of Rowlesburg” on October 12, 2011. Ms. Banister filed “Contestant’s Reply to Briefs of Margaret Schollar and the Town of Rowlesburg” on October 17, 2011.

On October 24, 2011, the parties appeared before the Court for oral argument. C. Paul Estep, Esquire, appeared for Ms. Banister; Sheila Kae Williams, Esquire, appeared for the Town of Rowlesburg; and Neil A. Reed, Esquire, appeared for Ms. Schollar. The Court thereupon took the matter under advisement.

Findings of Fact

1. The Town of Rowlesburg held a mayoral election on June 14, 2011. (Order entered September 28, 2011, at 1.) Both Ms. Schollar and Ms. Banister were candidates for the office of mayor. (*Id.*) A count of the votes determined that Ms. Schollar received 59 votes and Ms. Banister received 56 votes. (*Id.*)

2. On June 21, 2011, the Rowlesburg Town Council met to canvass the ballots of the mayoral election. (June 21, 2011 Town of Rowlesburg Minutes.) Five provisional ballots were cast in the election, all of which were denied by the Town Council.³ (*Id.*) The results of the election were publicly declared at the June 21, 2011 Town of Rowlesburg meeting. The Town Council certified the election after conducting the canvass.⁴ (*Id.*)

3. Ms. Banister made no request for recount within 48 hours of the canvass. (Order entered September 28, 2011, at 1.)

4. Ms. Banister filed a “Notice of Contested Election” on or about June 24, 2011. (Pet’r’s Ex. A filed August 23, 2011.) As a basis for the contest, Ms. Banister identified four

³ The Order entered by this Court on September 28, 2011, from the hearing held September 2, 2011, stated that no provisional ballots were cast. However, the Town of Rowlesburg Minutes filed in the court file on September 27, 2011, indicate that five provisional ballots were cast and denied. The individuals who cast the five provisional ballots are not identified in the record before the Court.

⁴ West Virginia Code § 8-5-17 (1969) (Repl. Vol. 2007) provides that the canvass of a municipal election shall be conducted by the governing body of the municipality.

specific ballots cast at the mayoral election that she alleged were unlawful. (Order entered September 28, 2011, at 1.)

5. A hearing on the election contest was held before the Town Council of Rowlesburg on July 21, 2011. (*Id.*) The Town Council heard the testimony of several witnesses at the July 21, 2011 hearing regarding the four ballots challenged by Ms. Banister. (*Id.*) The Court notes that none of the four ballots were challenged by the poll workers nor were the poll books showing the names and/or addresses of the four voters made a part of the hearing. During the hearing a motion for executive session was made and the Town Council then met in an executive session. (July 21, 2011 Town of Rowlesburg Minutes at 3.) After adjourning from the executive session, the Town Council unanimously voted on July 21, 2011, to remove the four contested ballots and scheduled a recount of the remaining ballots. (*Id.*; Order entered September 28, 2011, at 1.) A recount of the votes with the four challenged ballots removed was scheduled to occur on July 25, 2011.⁵ (*Id.*)

6. The Town Council again met on July 25, 2011, to conduct the aforementioned ballot recount. (July 25, 2011 Town of Rowlesburg Minutes at 1.) The ballot box was opened and it was determined that a “[r]ecount could not take place because [the] ballots had no names or numbers on them.” (*Id.*) Town Council then went into an executive session “to discuss legal options.” (*Id.*) At the conclusion of the executive session, a motion was made to uphold the original election results and deny Ms. Banister’s petition to contest the election. (*Id.*) The motion carried and Ms. Schollar was declared the winner of the mayoral election. (*Id.*)

7. The “Appeal of Certification of Election” was filed by Ms. Banister before this Court on August 23, 2011. It is from this Appeal that this Order follows.

⁵ The Town of Rowlesburg Minutes from July 21, 2011, identify that the recount was scheduled for June 25, 2011. The Town of Rowlesburg’s next meeting took place on July 25, 2011.

Standard of Review

West Virginia Code § 3-7-7 governs the contest of elections and their appeal to the circuit court. It provides, in pertinent part, the following procedural standard and standard of review for this Court to follow on appeal of this election contest:

When such appeal is taken to the circuit court, as hereinbefore provided, it shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by the county court [county commission], and the circuit court shall decide the contest upon the merits.

In the Syllabus of *State ex rel. Bowling v. Greenbrier County Comm'n*, 212 W. Va. 647, 575 S.E.2d 257 (2002) (per curiam) (citing Syl. Pt. 6, *Brooks v. Crum*, 158 W. Va. 882, 216 S.E.2d 220 (1975)), the Court stated:

While the appellate court may examine the record in the review of election contests in order to reach an independent conclusion, it merely determines whether the conclusions of law are warranted by the findings of fact, and it will not, as a general rule, disturb findings of fact on conflicting evidence unless such findings are manifestly wrong or against the weight of the evidence.

Conclusions of Law

1. W. Va. Code § 8-5-17 states, in pertinent part:

All elections ordered and held by a municipality under the provisions of this chapter shall be canvassed by the governing body of such municipality.

2. W. Va. Code §§ 3-6-9(a)(8) – 3-6-9(a)(8)(A) (2009) (Repl. Vol. 2011) provides that the canvassing board shall publicly declare the election results after canvassing the election, but “shall not enter an order certifying the election results for a period of forty-eight hours after the declaration.” During the 48-hour period, “a candidate on the ballot . . . may demand the board to open and examine any of the sealed packages of ballots and recount them.” W. Va. Code § 3-6-9(b) (emphasis added). At the conclusion of the 48-hour period, the canvassing

board shall enter an order certifying the "election results except for those offices in which a recount has been demanded." W. Va. Code § 3-6-9(a)(8)(A).

3. W. Va. Code § 3-7-6 (2002) (Repl. Vol. 2011) provides a mechanism whereby a person may contest the result of a municipal election. The section states, in pertinent part:

A person intending to contest the election of another . . . shall, within ten days after the result of the election is certified, give the contestee notice in writing of such intention and a list of the votes he will dispute, with the objections to each, and of the votes rejected for which he will contend. If the contestant objects to the legality of the election or the qualification of the person returned as elected, the notice shall set forth the facts on which such objection is founded. The person whose election is so contested shall, within ten days after receiving such notice, deliver to the contestant a like list of the votes he will dispute, with the objections to each, and of the rejected votes for which he will contend; and, if he has any objection to the qualification of the contestant, he shall specify in writing the facts on which the objection is founded. Each party shall append to his notice an affidavit that he verily believes the matters and things set forth to be true. If new facts be discovered by either party after he has given notice as aforesaid, he may, within ten days after such discovery, give an additional notice to his adversary, with the specifications and affidavit prescribed in this section.

The provisions of this section apply to all elections, including municipal elections, except that the governing body of the municipality is the judge of any contest of a municipal election.

4. W. Va. Code § 3-7-8 (1963) (Repl. Vol. 2011) provides:

Though illegal votes be received, or legal votes be rejected, at any place of voting, the returns of the votes taken at such place shall not be set aside for that cause, but it may be shown, by proper evidence before the tribunal authorized by law to hear and determine contested elections, for whom such illegal votes or any of them were cast, or for whom the legal votes which were rejected would have been given, and the returns shall be corrected only to the extent that it is so shown.

5. The West Virginia Supreme Court, in *Miller v. County Comm'n of Boone County*, 208 W. Va. 263, 539 S.E.2d 770 (2000), considered the contested results of a Boone County primary election. The primary election was held May 9, 2000, between Jennings Miller (Mr. Miller) and Roger L. Weaver (Mr. Weaver) for the Democratic nomination for Assessor.

Id., 208 W. Va. at 266, 539 S.E.2d at 773. A canvass was conducted by the Boone County Commission, as the Board of Canvassers, beginning on May 12, 2000, and resulting in the declaration of the winner on May 22, 2000. *Id.*, 208 W. Va. at 265-66, 539 S.E.2d at 772-73. The final results of the election were as follows: Mr. Miller received 3,174 votes and Mr. Weaver received 3,158 votes. *Id.*, 208 W. Va. at 266, 539 S.E.2d at 773.

On May 25, 2000, Mr. Weaver filed a notice demanding a recount of the primary election results. *Id.* Mr. Weaver's request for a recount was made outside the 48-hour deadline for filing such requests. *Id.* See W. Va. Code § 3-6-9(b). On May 30, 2000, the Board of Canvassers certified the May 9, 2000 election, declared Mr. Miller the winner, and denied Mr. Weaver's request for a recount on the basis that it was filed outside of the 48-hour deadline. *Miller*, 208 W. Va. at 266, 539 S.E.2d at 773. Thereafter, on June 1, 2000, Mr. Weaver filed a notice of contest, specifically alleging: "1) the County Commission erroneously failed to grant [Mr. Weaver's] motion for a recount; 2) the Board of Canvassers should have counted sixty-six votes specifically listed by [Mr. Weaver]; and 3) the Board of Canvassers should have challenged some thirty-six absentee votes which were counted." *Id.* Mr Weaver did not "contest the legality of the election or the qualification or eligibility of [Mr. Miller.]" *Id.* The election contest was scheduled to be heard by the Boone County Commission on June 19, 2000. *Id.* On June 15, 2000, Mr. Miller filed a petition for writ of prohibition, seeking to prohibit the County Commission from conducting the election contest hearing because Mr. Weaver had not timely requested a recount within the 48-hour window under W. Va. Code § 3-6-9(b). *Id.* The circuit court granted the writ of prohibition and Mr. Weaver appealed to the West Virginia Supreme Court of Appeals. *Id.*

On appeal Mr. Weaver contended that an election recount and election contest are separate and distinct and that there was no justification for the requirement of a recount before there was jurisdiction to hold an election contest. *Id.*

With the aforementioned facts, the West Virginia Supreme Court considered specifically whether an election candidate “must demand a recount of the election results before the County Commission, acting as the Board of Canvassers, as a prerequisite for filing a petition contesting the election.” *Id.* (citation omitted).

The Supreme Court reviewed the West Virginia Code sections relating to election recounts (W. Va. Code § 3-6-9) and election contests (W. Va. Code § 3-7-6). *Miller*, 208 W. Va. at 267, 539 S.E.2d at 774. The Court also stated as follows:

A contest and a recount . . . are very distinct procedures under our election law. The county court, sitting as a Board of Canvassers in a recount for a primary election, may only do that which the statute authorizes it to do.

Cases construing the duties of a board of canvassers say in effect that the board may only consider matters apparent on the face of the ballot and matters apparent to the personal knowledge of election officers and officials and those casting ballots. In other words, only matters patent and intrinsic to the ballot and counting procedures are proper subjects for review and determination by the board of canvassers.

On the other hand, the county court sitting as an election contest court, may take evidence, consider and make determinations of matters extrinsic to the election returns. Sitting as an election court in a contest pursuant to *Code*, 1931, 3-5-20, as amended, and *Code*, 1931, 3-7-7 and 8, as amended, the election court may determine the legality of votes cast.

Id., 208 W. Va. at 268, 539 S.E.2d at 775 (citations omitted). Based upon these previous findings of the Court, the Court established Syllabus Point 5, which states:

Where a candidate seeks to contest specific ballots cast in an election pursuant to the provisions of West Virginia Code § 3-7-6 (1999), he must first demand that the Board of Canvassers conduct a recount of the ballots pursuant to the provisions of West Virginia Code § 3-6-9 (1999). Where, however, a candidate seeks to contest only such matters as fraud, an elected candidate’s eligibility, or the legality of the election, the candidate may proceed directly with an election contest pursuant to the provisions of West Virginia Code § 3-7-6,

thereby omitting the recount procedure set forth in West Virginia Code § 3-6-9, provided that any recount proceeding which was otherwise initiated has terminated.

Id. at Syl. Pt. 5, 208 W. Va. 263, 539 S.E.2d 770 (emphasis added).

The Court then determined that the circuit court properly issued the writ of prohibition because the County Commission “would have been acting in contravention of a clear statutory mandate that a recount occur first[]” if it would have decided the contest of the election on the issue of the ballots’ validity. *Id.*, 208 W. Va. at 270, 539 S.E.2d at 777.

6. The language of the above-cited West Virginia Code provisions and the West Virginia Supreme Court decision in the case of *Miller v. County Comm’n of Boone County* are persuasive authority for the proposition that because Ms. Banister did not timely request a recount within the 48-hour window contemplated by W. Va. Code § 3-6-9, she is precluded from initiating an election contest under W. Va. Code § 3-7-6 where she seeks to contest four specific ballots cast in the Rowlesburg mayoral election.

7. Ms. Banister did not contest Ms. Schollar’s eligibility or the legality of the election conducted on June 14, 2011. While Petitioner alleges “fraud,” the fraud she alleges does not relate to the manner in which the election was conducted, but instead relates to the four specific ballots noted in her petition. The *Miller* case held that “[w]here a candidate seeks to contest specific ballots cast in an election pursuant to the provisions of West Virginia Code § 3-7-6 (1999), [she] must first demand that the Board of Canvassers conduct a recount of the ballots pursuant to the provisions of West Virginia Code § 3-6-9 (1999).” Syl. Pt. 5, *Miller*, 208 W. Va. 263, 539 S.E.2d 770.

8. Ms. Banister argues that she was deprived of the opportunity to proceed with requesting a recount because the Board of Canvassers certified the election results on June 21,

2011, at the same time it publicly announced the results. The argument presented is speculative in that if the results had not been certified for 48 hours as required by W. Va. Code § 3-6-9, counsel for Ms. Banister presumes that she would then have demanded a recount in the 48-hour period.⁶ If Ms. Banister wanted to pursue a recount under the factual circumstances presented but was denied that right, she could have filed a writ of mandamus with this Court pursuant to W. Va. Code § 3-1-45 (2003) (Repl. Vol. 2011) demanding that her demand for a recount, if filed, be conducted pursuant to the canvassing board's mandatory duty to permit a candidate to demand a recount within 48 hours of the declaration of the winner of the election.

9. Petitioner also argues that to demand a recount was a futile or needless act. This Court notes, however, that the West Virginia Supreme Court, in its discussion of *Miller*, stated the purposes of requiring an election contestant to request a recount within the 48-hour window. *See Miller*, 208 W. Va. at 269, 539 S.E.2d at 776. Specifically, the West Virginia Supreme Court noted “the limited function of an election recount to decide matters which can be resolved intrinsically from the plain face of the actual ballot serves to ‘lay the basis for a[n] [election] contest[,]’ because there are ‘many irregularities and illegalities discoverable in the course of a recount that cannot be corrected in that proceeding.’” *Id.* In addition a recount “places all candidates who filed for the office in which the recount has been demanded on notice that problems may exist with specific votes cast in the election.” *Id.* The Court then noted:

[A] recount gives all interested candidates in that particular race an opportunity: 1) to observe the manner in which the Board of Canvassers conducts the recount; 2) “to notify the board, in writing, of their intention to preserve their right to demand a recount of precincts not requested to be recounted by the candidate originally requesting a recount of ballots cast[;]” and 3) to identify votes cast which may be challenged as irregular or illegal in an election contest. *See W. Va. Code § 3-6-9(b).*

⁶ If Ms. Banister had timely requested a recount within the 48-hour window, the results of the instant case could be different.

Id. (alterations in the original).

The West Virginia Supreme Court in *Miller* noted that “[t]he elimination of [the recount] procedure where specific votes are in dispute would necessarily result in a lopsided and unfair playing field upon which to base an election contest.” *Id.* (emphasis added). Therefore, the West Virginia Supreme Court concluded that: “where the challenge to election results stems from specific votes cast, a recount plays an integral and indispensable role tantamount to fundamental principles of due process, which cannot be ignored or omitted.” *Id.* (emphasis added).

10. The Petitioner further contends that she should not be required to demand a recount within the 48-hour window because of fraud, alleged violations of the Open Governmental Proceedings Act,⁷ deficiencies in the canvass, and the totality of the circumstances. The Court finds these assertions unpersuasive. The alleged fraud relates to the four specific ballots identified by Ms. Banister, not fraud in the election itself. As to the other allegations this Court notes that the Town of Rowlesburg should not have held an election contest hearing on July 21 and July 25, 2011, due to Ms. Banister’s failure to demand a recount within the 48-hour window, which the Court in *Miller* said was “a prerequisite to proceeding to an election contest.” *Id.*, 208 W. Va. at 270, 539 S.E.2d at 777 (emphasis added). Therefore, the Court does not consider the meetings of July 21 and July 25, 2011, as grounds to overlook established statutory authority and case law.

11. This Court is constrained to add that it is not unmindful of the fact that the result reached is certainly not perfect. It can be argued that the result reached here today may frustrate the will of the Town of Rowlesburg voters. However, this Court cannot amend the controlling West Virginia statutes nor ignore prior case law; rather, it must follow the rule of law.

⁷ W. Va. Code §§ 6-9A-1 – 6-9A-12.

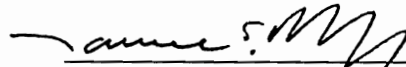
Accordingly, it is hereby **ORDERED** that the Petitioner's "Appeal of Certification of Election" be, and is, hereby **DENIED**.

All parties are saved their exceptions to the ruling of the Court

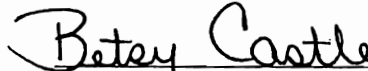
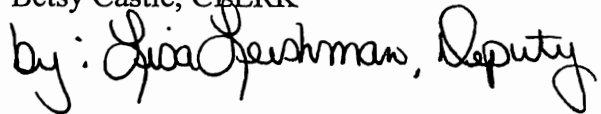
The Court further **ORDERS** that the Clerk of the Court shall personally deliver or deliver by first-class mail a certified copy of this Order to C. Paul Estep, Esquire; Neil A. Reed, Esquire; and Sheila K. Williams, Esquire.

3-Copies
SID 11-4-11

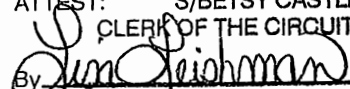
ENTER this 7 day of November, 2011.


Lawrance S. Miller Jr., JUDGE

ENTERED this 4 day of November, 2011.


Betsy Castle, CLERK
by:  Deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By:  Deputy