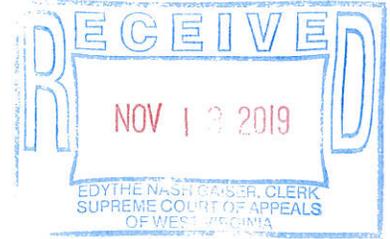


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
MARJORIE FLINN YOST,
BARBARA HUMES,



Individual Contestees-Respondents Below, Petitioners,

v.

Case No. 19-1018

NANCY SINGLETON CASE and
DEBORAH A. MCGEE,

Individual Contestors-Petitioners Below, Respondents.

**PETITIONERS' MOTION TO EXPEDITE BRIEFING AND DECISION OF
ELECTION CONTEST APPEAL**

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Petitioners move to expedite this statutory appeal of an election contest proceeding under West Virginia Code §§ 3-7-6 and 3-7-7. *See* W. Va. R. App. P. 29(c). Briefing and decision in this statutory appeal should and can be done expeditiously for the following reasons:

1. On June 11, 2019, the Corporation of Harpers Ferry held a municipal election for, among other offices, five at-large council seats. Respondents Case and McGee were candidates for the council seats. They lost.
2. A recount confirmed the results, and the Board of Canvassers certified the election results on June 28. On June 29 at noon, the new members of the Town Council were sworn in. Those members, including Petitioners Johnson, Thompson, and Humes, still hold their council seats.
3. Respondents filed their notice of election contest on July 8, pursuant to W. Va. Code § 3-7-6. The election contest trial was held on August 24, before the Town Council acting as contest tribunal or trial court (the “Trial Court”), also under W. Va. § 3-7-6. Counsel for the parties presented evidence for the record, took sworn testimony that was transcribed, made arguments, and thereafter submitted proposed orders.
4. On September 11, the Trial Court entered findings of fact and conclusions of law resolving the election contest, deciding that the Board of Canvassers’ decision not to count four provisional ballots, as Respondents had sought, was correct under binding law.
5. With the election results still unchanged, Respondents appealed to the Circuit Court on September 27, pursuant to West Virginia Code § 3-7-7. Following expedited review, the Circuit Court (sitting as an appellate court) issued its decision *reversing* the decision of the Trial Court on November 6, ordering that the four disputed ballots must be counted. On that same day, and in the interest of speed, Petitioners filed a Notice of Appeal in this

Court. *See* W. Va. Code § 3-7-7 (“From the decision of the circuit court, an appeal shall lie to the supreme court of appeals. . . .”).¹

6. This final step in the election contest process, like the proceedings below, should be resolved as expeditiously as reasonably practicable in light of the strong public interest in bringing finality and certainty to our electoral process.
7. This Court has long resolved election contests expeditiously. For example, in *State ex rel. Bowling v. Greenbrier Cty. Comm’n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002), this Court expedited review of an election contest under West Virginia Code § 3-7-7. There, following briefing, this Court entered in order “that reversed the circuit court and reinstated the decision of the [Trial Court], with an opinion to follow.” *See id.* This Court then issued an opinion in due course.
8. What happened in *Bowling* should happen here. In *Bowling*, the Circuit Court, which acts “as an appellate court in such cases,” 212 W. Va. at 649, 575 S.E.2d at 259, had wrongly substituted its own version of the facts for those found by the trial court after hearing testimony and weighing credibility of witnesses, *see id.* at 52, 575 S.E.2d at 262. The “trial court” in *Bowling* was the County Commission; in this case, it was the municipal governing body, the Town Council. *See* W. Va. Code § 3-7-6. The difference depends only on which elections are being contested.
9. In this case (like *Bowling*), the Circuit Court also failed to heed this Court’s command that, upon its appellate review under Section 3-7-7, a Circuit Court “must give the [Trial

¹ The same day that Petitioners filed their Notice of Appeal, the undersigned asked counsel for Respondents if they would be willing to propose a *joint* motion to expedite this appeal, since Respondents had consistently sought to expedite the contest process (at least until they finally received a favorable decision from the Circuit Court). Counsel for Respondents has still not responded to the proposal and Petitioners are unwilling to wait any longer for an answer.

Court]’s factual determinations the same sort of deference that appellate courts generally give to fact-finder tribunals—disturbing such determinations only when they are arbitrary, capricious, or clearly wrong.” *Bowling*, 212 W. Va. at 649, 575 S.E.2d at 259.

10. The Circuit Court’s order that reversed the Trial Court committed the same principal reversible error as the Circuit Court in *Bowling*. As briefing will explain, the Circuit Court erred by 1) overturning the factual findings of the Trial Court as to the question of residency and registration of the voters who cast the four provisional ballots at issue; 2) holding that binding decisions of this Court, including *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949), were silently overridden by statutory enactments; and, among other things, 3) concluding that the voters who cast the challenged ballots in this case, who knowingly registered to vote in the wrong location (despite registering under oath), constituted a “technical error” under West Virginia Code § 3-1-41(e) that can simply be overlooked.

11. In light of the above, this Court should adopt the following expedited briefing schedule:

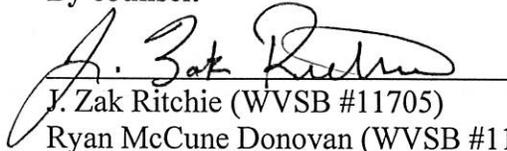
Petitioners’ Brief	14 days from entry of scheduling order
Respondents’ Brief	14 days from filing of Petitioners’ brief
Petitioners’ Reply	7 days from filing of Respondents’ brief

12. Accordingly, this Court should expedite this appeal, order briefing as proposed, and thereafter issue an order reversing the Circuit Court’s intermediate appellate decision, thereby restoring the decision of the Trial Court and bringing final resolution to this election contest. Petitioners are willing to waive oral argument in light of the need for speed, and any subsequent opinion may be by memorandum opinion due to the settled questions of law presented.

Respectfully submitted,

**HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
MARJORIE FLINN YOST, and
BARBARA HUMES,
each in their individual capacities as Individual
Contestees-Respondents Below, Petitioners,**

By counsel:


J. Zak Ritchie (WVSB #11705)

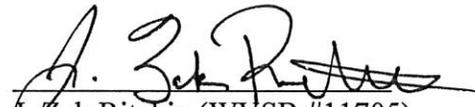
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CERTIFICATE OF SERVICE

I, J. Zak Ritchie, do hereby certify that on November 13, 2019, a true and correct copy of the foregoing was served by US Mail and email on the following parties:

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