

IN THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA  
CHARLESTON

LONNIE HANNAH, Sheriff of  
Mingo County; MINGO OFFICE OF  
EMERGENCY SERVICES; and THE  
COUNTY COMMISSION OF MINGO COUNTY,

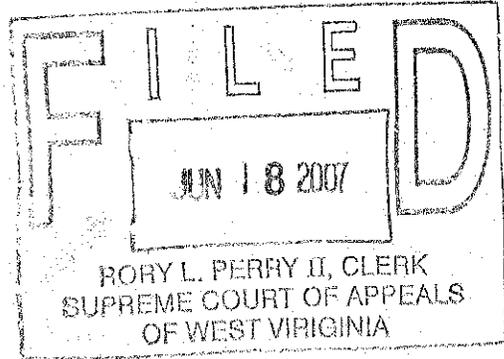
Lonnie Hannah, Sheriff of Mingo County,  
Appellant/Defendant-Below,

v.

Appeal No. 33382

MARCUM TRUCKING COMPANY, INC.; and  
263 TOWING, INC.,

Appellees/Plaintiffs-Below.



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**BRIEF OF APPELLEE**  
**COUNTY COMMISSION OF MINGO COUNTY**

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**BRIEF OF APPELLEE COUNTY COMMISSION OF MINGO COUNTY**

**INTRODUCTION**

Pursuant to Rule 10(b) of the Rules of Appellate Procedure of the Supreme Court of Appeals of West Virginia, the Appellee, County Commission of Mingo County, (“Commission”), defendant/respondent below, files this brief seeking to have the decisions of the Circuit Court of Mingo County, West Virginia ordering the Sheriff of Mingo County to sign checks issued by the Commission in payment of 2004 flood work upheld because the decisions were correct.

The circuit court considered the Sheriff’s law enforcement concerns, his duty as ex officio county treasurer, the Commission’s responsibility and authority to supervise and manage the fiscal affairs of the county, the relevant law, and concluded that the Sheriff had a legal duty to sign the checks.

Though attorney fees and interest were awarded against the Sheriff by the circuit court, the Commission does not take a position on the awards since the payment thereof would in essence be an expenditure of county funds as the payments would come out of the Sheriff’s budget.<sup>1</sup>

**KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Marcum Trucking Company, Inc. (“Marcum”) and 263 Towing, Inc. (“263”), Plaintiffs/Petitioners below filed Writs of Mandamus in the Circuit Court of Mingo County on October 18, 2005, seeking orders compelling the Sheriff of Mingo County, Lonnie Hannah, to

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<sup>1</sup> The circuit court ordered that attorney fees and interest be paid out of the Sheriff’s budget. (Court’s Marcum Amended Final Order Granting Writ Of Mandamus, ¶ 23, 24, and 25; 263 Final Order Granting Writ Of Mandamus, ¶ 21, 22. – attorney fees only)

sign checks issued by the Commission to them in payment of 2004 flood related work. Marcum and 263 filed Amended Petitions for Writs of Mandamus on January 20, 2006 in response to the circuit court's order for additional information.

A hearing was held on the Marcum writ on August 29, 2006. The circuit court entered an Order on September 29, 2006 ordering Sheriff Hannah to sign the Marcum check. An Amended Order was entered by the circuit court on October 3, 2006, ordering the Sheriff to sign the Marcum check and awarding Marcum interest of \$9,027.19 and attorney fees of \$4,214.00.

A hearing was held on 263's writ on October 2, 2006. The circuit court entered an Order on October 3, 2006 ordering the Sheriff to sign the check and awarding 263 attorney fees of \$1,575.00. No interest was awarded by the circuit court.

Sheriff Hannah filed motions to vacate the circuit court's Orders granting the writs, to stay the proceedings, and to disqualify Judge Thornsby.<sup>2</sup> Chief Justice Davis refused the Sheriff's request to disqualify Judge Thornsby. Judge Thornsby thereafter denied Sheriff Hannah's motions to vacate the Orders and to stay the proceedings.

### **STATEMENT OF FACTS**

Widespread flooding occurred in Mingo County, West Virginia in the spring of 2004. As a result thereof, Marcum and 263, along with others, were employed by the Commission to do flood recovery work. As the work progressed, Marcum, 263, and others submitted invoices to the Commission for payment.

In July and August of 2004, Marcum submitted invoices totaling \$133,275.00. Partial payments totaling of \$30,000.00 were made, leaving \$103,275.00 owing to Marcum. The Commission, after review of the billing by its Emergency Services Director, issued a check in

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<sup>2</sup> The motion of disqualify was made after the hearings.

payment of the outstanding Marcum balance on June 15, 2005. Sheriff Hannah refused to sign the check. Three other checks were issued in payment of Marcum – September 9, 2005, October 28, 2005, and July 12, 2006; the Sheriff refused to sign each one. Marcum on October 18, 2005 filed its writ of mandamus asking that the circuit court order Sheriff Hannah to sign its check as it was his ministerial duty to do so.

The circuit court held a hearing on the writ on August 29<sup>th</sup>, 2006.<sup>3</sup> The circuit court, by Final Order dated September 29, 2006 and by an Amended Final Order entered October 3, 2006, ordered Sheriff Hannah to sign the July 12, 2006 check.

Invoices totaling \$313,180.00 were submitted by 263 in July and August of 2004. A partial payment of \$25,000.00 was made in March 2005, making the outstanding balance owed 263, according to its invoices, \$288,180.00. Of that figure, a check for \$7,680.00 was issued by the commission on June 10, 2005. The Sheriff refused to sign. Two other checks for \$7,680.00 were issued in payment by the Commission – September 9, 2005 and October 28, 2005. The Sheriff again refused to sign. 263 filed its writ of mandamus on October 18, 2005. While the writ was pending, the Commission discovered an error in 263's calculations and reduced the \$7,680.00 to \$6,680. A check was issued in payment on July 11, 2006. The Sheriff refused to sign. Following a review of 263's outstanding invoices by the Commission and negotiations with 263, the Commission issued a check in full payment to 263 for \$175,000 (which included the \$6,680.00) on September 26, 2006. The Sheriff refused to sign the check.

The circuit court, following a writ hearing on October 2, 2006, ordered Sheriff Hannah to sign the check. The Order is dated and entered October 3, 2006.

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<sup>3</sup> Sheriff Hannah was initially represented in the writs by the prosecuting attorney. The prosecutor withdrew upon objection of Marcum and 263 because of his prior disqualification in criminal proceedings involving Marcum and 263.

The Appellant, Sheriff Hannah, points out in his Statement of Facts that the owners of Marcum and 263 asserted their Fifth Amendment rights in another proceeding. This other proceeding was an ouster suit brought by Sheriff Hannah against Commission President Greg Smith after the writ hearings.

The owners of Marcum and 263 asserted their Fifth Amendment privilege in the ouster suit under questioning from Sheriff Hannah's lawyer, Letitia Neese Chafin. Sheriff Hannah had testified earlier in the case that the investigation was still ongoing.

Sheriff Hannah, in the ouster suit, asserted, as grounds for removal, his argument set forth on page 14 of his brief, that Commission President Greg Smith violated the law by representing Marcum Trucking. It should be made clear in the beginning that Commissioner Smith's representation was on a wholly unrelated matter<sup>4</sup> and that he was not representing Marcum before the Commission.

### ARGUMENT

**I. THE CIRCUIT COURT ACTED PROPERLY IN ORDERING THE SHERIFF TO CARRY OUT HIS DUTY TO SIGN CHECKS ISSUED BY THE MINGO COUNTY COMMISSION IN PAYMENT OF FLOOD RECOVERY WORK BECAUSE THE SHERIFF HAD REASONABLE TIME TO INVESTIGATE AND ACT UPON HIS SUSPICIONS OF FRAUD.**

**A. County commissions, not sheriffs, are vested with the supervision and administration of county fiscal affairs.**

It is clear that the Commission, not Sheriff Hannah, is vested with the supervision and administration of the fiscal affairs of Mingo County. "They [county commissions] shall also,

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<sup>4</sup> Commissioner Smith, in April and May of 2005, represented John D. Marcum, one of the owners of Marcum, in an Emergency Protective Order and injunction involving disputed property rights with a relative. In *Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986), the case cited by the Appellant, the public official had a conflict because he was a member of the State Board of Regents while at the same time he was suing physicians who were faculty members at the WVU Medical School and worked at WVU Medical Center.

under such regulations as may be prescribed by law, have *the superintendence and administration of the internal police and fiscal affairs of their counties.*” W.Va. Const., art. 9, § 11. (emphasis added). The same authority is granted in W.Va. Code § 7-1-3 and 5. W.Va. § 7-1-3 in pertinent part reads: “They [ county commissions] shall also, under the rules as now are or may be prescribed by law, have *the superintendence and administration of the internal police and fiscal affairs of their counties . . .*” (emphasis added). W.Va. § 7-1-5 in pertinent parts reads: “It shall be the duty of the county commission of each county to . . . *supervise the general management of the fiscal affairs and business of each county . . .*” (emphasis added).

This fiscal power includes discretion concerning the payment of claims against the county. Pursuant to section (b) (1) of the Prompt Pay Act of 1995, W.Va. Code § 7-5-7, county commissions are to issue checks in payment of legitimate uncontested invoices within 60 days of receipt. See also W.Va. Code § 7-5-3 which states that the county commissions decide whether to allow claims against the county, and W.Va. Code § 7-5-8 stating that no suits based on contract may be brought against the county, “until [the] claim first presented to commission for decision on payment.”

Sheriff Hannah is only the ex officio treasurer of the county and is not vested with discretion in the management of county fiscal affairs. See Syllabus Point 1, *Damron v. Ferrell* 143 W.Va. 773, 143 S.E.2d 469 (1955); see generally W.Va. Code § 7-5-1. He is to pay lawful orders issued by the commission, signed by the president of the commission and the county clerk. W.Va. § 7-5-4. If he refuses to do so, mandamus is a proper remedy. See *Eureka Pipe Line Co. v. Riggs*, 75 W.Va. 353, 83 S.E. 1020 (1914); syl. pt. 3, *State v. Rogers* 158 W.Va. 1041, 217 S.E.2d 65 (1975).

Notwithstanding the Sheriff's duties as ex officio treasurer, he also has the other duty as sheriff to investigate and enforce the law within his jurisdiction. *Monzingo v. Barnhart*, 169 W.Va. 31, 285 S.E.2d 497(1981) (citing 16 M.J. Sheriffs § 2). Admittedly, his ministerial duty as ex officio treasurer and his investigative duty as sheriff may at times, as they have in this case, come into conflict.

The Sheriff's excuse for not signing the checks is in essence that he believed that Marcum and 263 committed fraud by billing for work not performed. If he had reason to believe these suspicions then he had a duty to investigate. But his duty to investigate and prosecute is not unlimited, as there are other concerns besides his suspicions: the commission's fiscal responsibilities and the sheriff's ministerial duty as ex officio treasurer.

B. When a public official fails to perform his duty within a reasonable time, he may be compelled to do so by mandamus.

By October 2, 2006, the date of the last writ hearing (263's writ), Sheriff Hannah's investigation into the flood work had been going on for over two years, with no results, other than failed indictments on other Marcum and 263 invoices.<sup>5</sup> (Marcum Amended Final Order Granting Writ of Mandamus, Findings of Fact ¶ 4; 263 Final Order Granting Writ of Mandamus, Findings of Fact ¶ 7). Sheriff Hannah was required to perform his ministerial duty to sign the checks because he had reasonable time within which to act upon his suspicions.

When public officials fail to perform their ministerial duty at a time required by law, mandamus will lie to compel the discharge of such duty within a reasonable time. *See, Lacko v.*

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<sup>5</sup> The owners of Marcum Trucking and 263 were indicted in January 2006 for fraudulent billing for 2004 flood work. Sheriff Hannah appeared before the grand jury. Neither the "Marcum" nor the "263" indictment included any billing associated with the payments which were the subject of the writs. The indictments were dismissed upon motions of the defendants and the State's Motion to Nolle. No subsequent indictments have been returned by a grand jury.

*Richardson*, 450 S.E.2d 641, 192 W.Va. 52 (1994) (mandamus awarded against Workers Compensation Commissioner after unreasonable delay in processing claimants claims); *State ex rel. Paterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984) (mandamus issued compelling judge to rule on motions as 33 months delay was unreasonable); *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963) (mandamus issued requiring circuit judge to rule on a petition as seventeen month delay deemed unreasonable); *State ex rel. Fred Griggs et al. v. Patrick C. Graney, State Road Commissioner*, 143 W.Va. 610, 103 S.E.2d 878 (1958), (mandamus proper remedy to require State Road Commissioner to file condemnation suits for property damage when a reasonable time has passed since the alleged damage).

Sheriff Hannah certainly has had plenty time to act upon his suspicions. He sets out his suspicions and reasons in his brief but never provided the Commission nor the circuit court with any specific information to support his refusal to sign the checks. (Marcum Writ Transcript., pgs. 17,18, and 23; 263 Writ Transcript, pgs. 11,13, 14,15, 16,17,18, and 19; Marcum Amended Final Order Granting Writ of Mandamus, Findings of Fact ¶ 4; 263 Final Order Granting Writ of Mandamus, Findings of Fact ¶ 7). In fact, the Commission by three separate letters to the sheriff asked him for his input into the Marcum and 263 invoices.<sup>6</sup> (Marcum Tr., pg. 22 and 23). He never responded.

C. It is the Commission's ultimate responsibility under the Prompt Pay Act, not the Sheriff's, to determine what are legitimate and uncontested invoices entitled to payment.

The determination of whether a bill is legitimate and uncontested is a function of fiscal discretion which lays with the Commission not the Sheriff. That is not to say that the Sheriff or

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<sup>6</sup> The letters are dated October 14, 2005, December 20, 2005, and March 28, 2006.

anyone else could not “contest” an invoice by providing the Commission information and reasons why a bill should not be paid and have it considered.

It should be kept in mind that while the Marcum and 263 invoices remained unpaid, interest at 9.5% under the Prompt Pay Act was accruing.<sup>7</sup> Interest on the Marcum bill was accruing at \$817.59 a month and on the 263 bill at \$2,281.43 a month. It would have been fiscally irresponsible for the Commission to ignore this. Acting responsibly, knowing that decisions needed to be made, the Commission invited Sheriff Hannah, by letter three times, to provide it with his input concerning the bills: what amounts he disputed and why. He never did.<sup>8</sup>

- D. It would be a violation of the constitutional separation of powers for courts or any other entity besides the county commission to decide the payment of county bills.

The Commission has acted responsibly in carrying out its constitutional and statutory duties to supervise and manage the county’s fiscal affairs.

Prior to approval, Marcum’s invoices were reviewed and approved by the county’s Emergency Services Director. The Commission personally investigated and reviewed the invoices from 263 prior to approval. Sheriff Hannah was asked to provide the Commission with his objections to the invoices and did not. By the time of writ hearings, Sheriff Hannah’s investigation had been going on for over two years, all the while interest was accruing on the

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<sup>7</sup> The interest is at the rate determined by the state tax commissioner under the provisions of W.Va. Code § 11-10-17(a). See The Prompt Pay Act of 1995, W.Va. § 7-5-7(b) (1).

<sup>8</sup> The sheriff agreed in October 2005, just before the filing of Marcum’s writ, after a meeting with his counsel, the prosecuting attorney, commissioner John Mark Hubbard, and Commission counsel, Glen Rutledge, to sign the September 9, 2005 Marcum check. He changed his mind several days later and by letter dated October 21, 2005, notified the Commission that he would not sign the check, not because he “contested” the bill, but because the check was not signed by the president of the commission. A check with the Commission president’s signature was issued on October 28, 2005. The sheriff refused to sign it.

invoices. And finally, it should be remembered that Sheriff Hannah in October 2005 had agreed to sign the Marcum check but later refused, not because he contested the invoice, but because the president of the Commission had not signed the check.

Article V, § 1 of the Constitution of West Virginia prohibits one department of government from exercising the power of another: “The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; ....” This is a fundamental part of our law and must be strictly construed. Syllabus Point 1, *West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 580 S.E.2d 869 (2003).

To allow the courts, as suggested by the West Virginia Sheriff’s Association in its amicus brief, or another entity other than the Commission, as suggested by Sheriff Hannah, to decide whether bills incurred by a county should be paid would violate Article V, § 1 along with the constitutional and statutory authority given to the county commission.. This does not mean however that the commission is unbridled its discretion.

A standard of review already exists in the courts for review of the discretion of public bodies such as the commission. This Court has set forth that, “A court will not ordinarily interfere with the action of a public officer or tribunal clothed with discretion, in the absence of a clear showing of fraud, collusion or palpable abuse of discretion. Syllabus Point 2, *Bane v. The Board of Education of Monongalia*, 178 W.Va. 749, 364 S.E.2d 540 (1987); syl. pt. 6, *Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (1975). Although not required to because it did not have a writ of mandamus against the commission before it, the circuit court in essence inquired into the validity of the commission’s decisions when considering the writs. (Marcum Tr., pgs., 17, 18, and 23; 263 Tr., pgs., 13, 14, 15,16,17,18, and19).

## II. MANDAMUS WAS A PROPER REMEDY

For a writ of mandamus to properly issue three elements must coexist: "(1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." Syllabus Point 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

It is clear that Marcum and 263 after more than two years of delay and the Commission's decision to pay them had a clear legal right to have the checks signed by Sheriff Hannah. Sheriff Hannah had a reasonable time to act upon his suspicions of fraud. After a reasonable time, Sheriff Hannah's "discretion" turned into a duty which could be compelled by mandamus.

Part of Sheriff Hannah's argument against the writs is that the Commission did not have the money to pay the invoices and overspend its budget to do so. Not true. Sheriff Hannah at no time, in his answer to the writs or at the writ hearings raised the issue. The circuit court asked in the Marcum hearing if there was any dispute whether there was money to pay the check. (Marcum Tr., pg. 10) There was no dispute. Had the Commission overspent its budget to pay the invoices, as suggested, the state auditor would have "made a finding" in the following years fiscal audits. It did not and has not.

Sheriff Hannah cites *Ratliffe v. Wayne County Court*, 36 W.Va. 202, 14 S.E. 1004 (1892), for the proposition that mandamus was not a proper remedy because the "County and Sheriff are jointly liable for these damages in the form of prejudgment interest and attorney's fees."<sup>9</sup> (Appellant's Brief, pg.17). *Ratliffe* does not hold that joint liability of a county commission and

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<sup>9</sup> Sheriff Hannah's argument seeks to make the commission vicariously liable for his refusals, which it opposed. To adopt the Sheriff's argument is to say that the "penalty" (attorney fees and interest against him for his failure to sign the checks) makes the remedy wrong.

a sheriff makes mandamus an inappropriate remedy. The writ in *Ratliffe* was refused because there was nothing in the record showing that the county court had a duty to pay the petitioner, *Id.* at 22, not on any principle of joint liability as suggested by the Appellant.

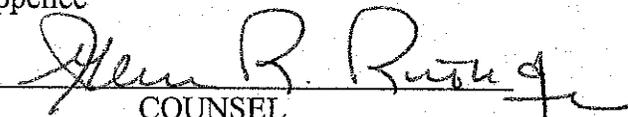
It is clear that mandamus is a proper remedy to require the performance of a nondiscretionary duty by governmental agencies or bodies. Syllabus Point 1, *State ex rel. Allstate Insurance Co. v. Union Public Service District*, 151 W.Va. 207, 151 S.E.2d 102 (1966); syl. pt. 4, *State ex rel. Affiliated Constr. Trades Found. v. Vieweg*, 205 W.Va. 687, 520 S.E.2d 854 (1999); syl. pt. 3, *Allen v. State Human Rights Commission*, 174 W.Va. 139, 324 S.E.2d 99 (1984); syl. pt. 4, *Glover v. Sims*, 121 W.Va. 407, 3 S.E.2d 612 (1939). syl pt. 3, *State v. Rogers* 158 W.Va. 1041, 217 S.E.2d 65 (1975). Mandamus was the appropriate remedy to compel Sheriff Hannah to perform his duty.

### CONCLUSION

For the foregoing reasons, the County Commission of Mingo County respectfully requests that this Court uphold the decisions of the Circuit Court of Mingo County ordering the Sheriff of Mingo County to sign checks issued by the Commission in payment of Marcum Trucking Company, Inc., and 263 Towing, Inc.

Respectfully submitted  
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Appellee

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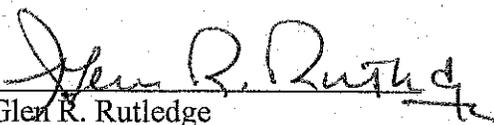
**CERTIFICATE OF SERVICE**

I, Glen R. Rutledge, counsel for Appellee, County Commission of Mingo County, do hereby certify that I caused the foregoing **BRIEF OF APPELLEE COUNTY COMMISSION OF MINGO COUNTY** to be served upon counsel of record by depositing a true and accurate copy of the same in the United States mail, postage prepaid, on this the 15<sup>TH</sup> day of JUNE, 2007, addressed as follows:

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