

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

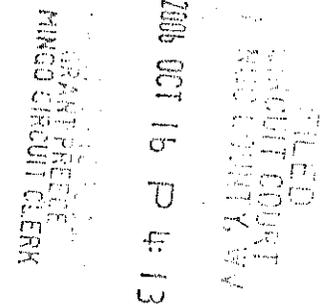
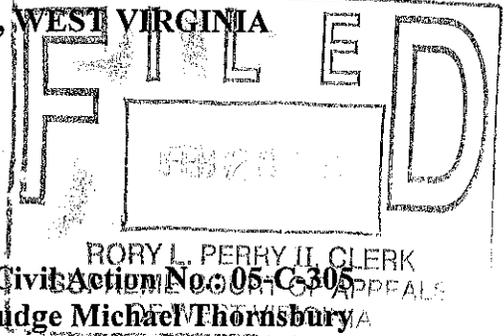
MARCUM TRUCKING COMPANY, INC.,
a West Virginia corporation,

Plaintiff/Petitioner,

v.

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

Defendants/Respondents.



**FINAL ORDER DENYING MOTION TO VACATE AND DENYING
APPLICATION FOR CIRCUIT COURT STAY OF PROCEEDINGS**

On October 3, 2006 this Court entered its Amended Final Order Granting a Writ of Mandamus in this matter. On October 4, 2006, Defendant, Sheriff Lonnie Hannah, filed a Motion to Vacate Final Order Granting Writ of Mandamus. This matter originally came before the Court on the 29th day of August 2006 pursuant to Plaintiff's Complaint seeking a Writ of Mandamus. The Plaintiff, Marcum Trucking Company, Inc., ("Marcum Trucking") is represented by counsel, Michael O. Callaghan; the Defendant, Lonnie Hannah is represented by counsel, Letitia N. Chafin; the Co-Defendant, The County Commission of Mingo County ("County Commission"), is represented by counsel, Glen R. Rutledge.

The Court now makes the following conclusions of law and judgment, to wit:

1. On October 3, 2006 the Court entered an Amended Final Order Granting Writ of Mandamus and ordered that Plaintiff was entitled to a Writ of Mandamus. The

Court also ordered that Lonnie Hannah, Sheriff of Mingo County, and Treasurer, sign the check for \$103,275.00 as previously ordered by the Mingo County Commission. The Court also awarded the amount of \$9,027.19 to the Plaintiff, Marcum Trucking for accrued interest, and ordered that the accrued interest was to be paid by the Sheriff, Lonnie Hannah, out of the budget of the Mingo County Sheriff's Department, rather than the Sheriff personally. The Court also ordered Mingo County Sheriff Lonnie Hannah to sign the checks for these sums that the County Commission properly issued in relation to this matter. Additionally, the Court awarded \$4,214.00 in attorney's fees to Petitioner, Marcum Trucking, which was to be paid out of the budget of the Mingo County Sheriff's Department.

2. On October 4, 2006 Sheriff Hannah, by and through counsel, filed a Motion to Vacate Final Order Granting Writ of Mandamus. In support of his motion Sheriff Hannah asserted that the motion should be granted because there was an "appearance of impropriety" and given the totality of the circumstances the order granting the Writ of Mandamus should be vacated. Sheriff Hannah also argued that "the Honorable Michael Thornsby recuse himself from this matter; that this matter be sent to the West Virginia Supreme Court of Appeals for assignment of a new judge; that the Final Order Granting Writ of Mandamus be vacated and the matter reheard by the new judge; and that any monies ordered paid be said order be held in a interest bearing escrow account pending resolution of this Motion." (Pages 3 and 4 of Sheriff Hannah' Motion to Vacate).

3. On October 10, 2006 the Court a response along with copies of the Final Order Granting Writ of Mandamus, and Sheriff Hannah's Motion to Vacate as well as the entire transcript of the proceedings to the Chief Justice of the West Virginia Supreme Court of Appeals for review.
4. On October 10, 2006 Sheriff Hannah, by and through counsel, filed an application for stay of proceedings with this Court pursuant to Rule 6(a) of the West Virginia Rules of Appellate Procedure.
5. On October 11, 2006 the Mingo County Commission, by and through counsel, filed a response to Sheriff Hannah's Motion to Vacate. Marcum Trucking also filed a response to Sheriff Hannah's Motion to Vacate on October 11, 2006.
6. On October 11, 2006 Chief Justice Robin Jean Davis of the West Virginia Supreme Court of Appeals issued an Administrative Order which states, in relevant part as follows:

“WHEREAS, The Honorable Michael Thornsby, Judge of the Thirtieth Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals of a motion filed for his disqualification from presiding in the above-styled cases; and WHEREAS, Judge Thornsby has further advised the Chief Justice that he does not wish to recuse himself voluntarily from presiding in said cases; and WHEREAS, Upon review of said motion, and in accordance with Trial Court Rule 17.01(c), the Chief Justice has determined that the evidence set out in support of the disqualification motion is insufficient to warrant such disqualification; IT IS THEREFORE ORDERED, That the Honorable Michael Thornsby, Judge of the Thirtieth Judicial Circuit, be, and he hereby is, directed to continue to preside in the above-referenced cases in accordance with the law...”

7. The Court notes that Sheriff Hannah's Motion to Vacate Final Order Granting Writ of Mandamus is incorrectly styled and fails to state which rule of civil

procedure the motion is based on. The phrases “motion for reconsideration”, “motion to reconsider”, “motion to vacate”, “motion set aside”, or “motion to reargue” are routinely used incorrectly by attorneys to refer to a motion to amend or alter a judgment. Labeling a Rule 59(e) motion as a motion to “reconsider”, “vacate”, “set aside”, or “reargue” is confusing to a trial court. Where such a motion is filed within 10 days of judgment it should be correctly styled as a Rule 59(e) motion to alter or amend judgment. *See Riffe v. Armstrong*, 1996, 477 S.E.2d 535, 197 W.Va. 626, rehearing refused; *Richardson v. Kennedy*, 1996, 475 S.E.2d 418, 197 W.Va. 326; *James M.B. v. Carolyn M.*, 1995, 456 S.E.2d 16, 193 W.Va. 289; *Graf v. West Virginia University*, 1992, 429 S.E.2d 496, 189 W.Va. 214. In the instant case Sheriff Hannah’s motion was filed within 10 days of the date the Amended Final Order was entered. Thus, the Court will treat the motion as a Rule 59(e) motion.

8. Rule 59 of the West Virginia Rules of Civil Procedure states that a new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. The rule also states that

any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

9. Rule 7(b)(1) of the West Virginia Rules of Civil Procedure states that “An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” Rule 7(b)(1) provides that the grounds for a motion seeking an order of a court shall be stated with particularity. The West Virginia Supreme Court of Appeals Court has recently held that grounds for a motion for a new trial must be stated with particularity and if this is not done the motion should not be considered. *See Steptoe v. Mason*, 153 W.Va. 783, 172 S.E.2d 587.
10. The only ground raised in support of a new trial was that the motion to vacate should be granted due to an “appearance of impropriety”. In *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374, 194 W.Va. 97 (1995) the West Virginia Supreme Court of Appeals held that a claim of appearance of impropriety does not automatically rise to level of fundamental defect in due process requiring new trial. Absent a showing of bias or prejudice, a new trial is unwarranted where there has been full trial on merits, there is no obvious error during original proceedings, the record shows that it is extremely unlikely prejudice could have affected the trial, and failure to disclose facts leading to disqualification was inadvertent. The Court notes that although the current case involves a Writ of Mandamus *Tennant* is still controlling case law.

11. In the current case the Chief Justice of the West Virginia Supreme Court of Appeals entered an Administrative Order denying the Motion on October 11, 2006 stating, "...the evidence set out in support of the disqualification motion is insufficient to warrant such disqualification." Further, all parties were given a full opportunity to present arguments, there were no obvious errors in the original proceedings, and the record shows there was no prejudice whatsoever that affected the Final Order. The County Commission has the authority to review, approve, and make fiscal decisions. The Court previously noted in its FINAL ORDER that neither the Court nor the Sheriff has a veto power over such decisions of the County Commission. Further, the record reflects that the Court inquired of the Sheriff of any factual basis for refusal and none was given at that time nor was a factual basis given in Sheriff Hannah's instant motion. Sheriff Hannah has failed to raise any grounds that support his Motion to Vacate and has failed to cite any statute, case law, or pertinent legal authority that supports his Motion to Vacate. Sheriff Hannah has not alleged any error of the Court, but instead relies on general allegations of the appearance of impropriety which were not improper at all and which have been denied. The motion does not and does not allege an error in the original proceedings and fails to state a reasonable basis for granting a new trial.
12. Accordingly, the Court **DENIES** Sheriff Hannah's Motion to Vacate Final Order Granting Writ of Mandamus since there is no meritorious or substantive reason to do so.

13. In regards to Sheriff Hannah's Application for Stay of Proceedings the Court **FINDS** that a Stay of Proceedings in this case would be improper. In support of the Application for Stay of Proceedings Sheriff Hannah requested that the Court grant the Stay of Proceedings and that the "be in effect for a period of sixty (60) days or until such time, either shorter, as is required to obtain a copy of the written transcript of all proceedings had in this matter from the official court reporter." Since written transcripts were prepared by the official court reporter and tendered on October 12, 2006 a Stay of Proceedings would be improper on this ground. Further, Sheriff Hannah has already signed the check for the sum of \$103,275.00, as previously ordered by this Court in its Amended Final Order Granting Writ of Mandamus. Thus, there is no legitimate reason for the Court to grant the Application for Stay of Proceedings when the only Order Sheriff Hannah has not followed at this time is to issue a check for payment of interest and attorney's fees as ordered in the Amended Final Order entered on October 3, 2006.

14. Accordingly, Sheriff Hannah's Application for Stay of Proceedings is not meritorious and is **DENIED**.

JUDGMENT

WHEREFORE, the Court, having reviewed all motions, and based upon the conclusions of law and judgment herein, hereby **DENIES** Sheriff Hannah's Motion to Vacate Final Order Granting Writ of Mandamus for the reasons stated herein. The Court also **DENIES** Sheriff Hannah's Application for Stay of Proceedings for the reasons stated

herein. There being no other issues pending before the Court, the matter is hereby
STRICKEN from the active docket and the matter is **FINAL** and **APPEALABLE**.

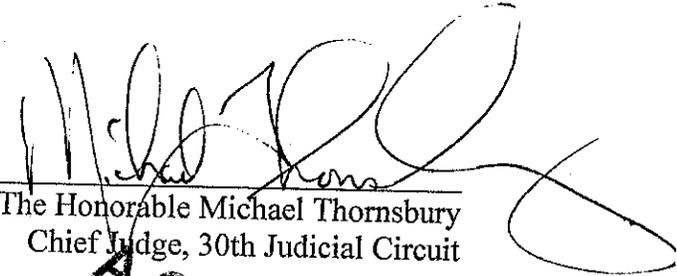
The Clerk is **DIRECTED** to send attested copies of this Order to all counsel of record
and to the treasurer of Mingo County, Sheriff Lonnie Hannah.

Glen Rutledge, Esq. (Counsel for Mingo County Commission)
P.O. Box 340
Williamson, W.V. 25661

Michael O. Callaghan, Esq. (Counsel for Marcum Trucking)
P.O. Box 3752
Charleston, W.V. 25337

Letitia N. Chafin (Counsel for Sheriff Hannah)
The H. Truman Chafin Law Firm, PLLC
P.O. Box 1799
Williamson, W.V. 25661

ENTERED this 16th day of October 2006.


The Honorable Michael Thornsby
Chief Judge, 30th Judicial Circuit

A COPY TESTE
[Handwritten signature]
CIRCUIT CLERK, MINGO COUNTY, W.VA.