

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

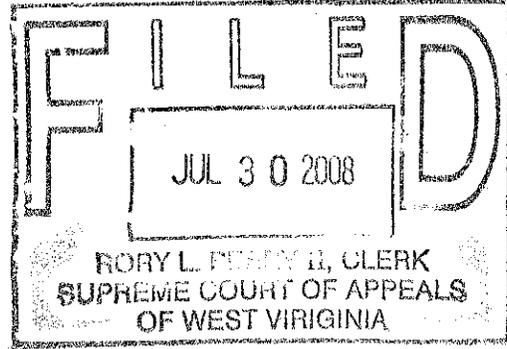
**STATE OF WEST VIRGINIA ex rel.
JOSEPH CICCHIRILLO, Commissioner
of the Division of Motor Vehicles,**

Petitioner,

v.

**THE HONORABLE J.D. BEANE, Judge
of the Circuit Court of Wood County, and
THOMAS J. SANTER, Real Party in Interest,**

Respondents.



EMERGENCY PETITION FOR A WRIT OF PROHIBITION

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I.

INTRODUCTION

The Commissioner of the Division of Motor Vehicles seeks an emergency writ of prohibition prohibiting the Circuit Court of Wood County from enforcing an order in prohibition that the circuit court issued in clear violation of the jurisdictional provisions of West Virginia Code § 53-1-1 and the venue provisions of West Virginia Code §14-2-2. Respondent Santer's driver's license was suspended by the Division following notification from the State of Ohio that he had been in an automobile accident as a result of having a seizure. Although the primary position of the Division in this matter is that the circuit court improperly assumed jurisdiction in this matter and that venue is improper, the emergency nature of this petition arises from that portion of the circuit court's order by which the suspension of Respondent Santer's privilege to drive is stayed pending further review by the court. In short, a court which lacks jurisdiction over the matter has effectively restored Mr.

Santer's driving privileges with no adjudication of the merits of the summary suspension. In the interests of public safety, the Division hereby seeks relief from this Court.

II.

STATEMENT OF FACTS

Thomas Santer was driving his car in Marietta, Ohio, when he lost consciousness. Petitioner's Appendix of Exhibits Exhibit 1 (hereinafter, "Pet'r Appx. Ex. ____") at 1. As a result of his loss of consciousness, he lost control of his vehicle and crossed from his lane of travel through a grass median, across two lanes of traffic, and onto a private residence, all while traveling at highway speed. *Id.* His car was impeded by terrain, trees, and a fence, and only then did it come to rest—75 feet off the roadway. *Id.* As a consequence of this accident, the Marietta, Ohio, Municipal Court decided that the public safety required that the West Virginia Division of Motor Vehicles be notified of the court's findings. *Id.* at 1-2.

Consequently, DMV sent a medical report form to Mr. Santer, requesting that the form be completed by Mr. Santer's attending physician. Pet'r Appx. Ex. 2. Vicki Cox, D.O. completed the form and returned it to the DMV indicating that it was safe for Mr. Santer to drive. Pet'r Appx. Ex. 3 at 2. The form did not specify what caused Mr. Santer's loss of consciousness—although it did reference that Mr. Santer had seen two medical specialists in the preceding two years—a neurosurgeon and a neurologist. *Id.*

Because the medical report form did not specify the cause of his unconsciousness, the DMV requested that Mr. Santer's neurologist complete a medical report form. Pet'r Appx. Ex. 3. Barry Loudon, M.D. completed the new form, stating that Mr. Santer had a "generalized convulsive activity," Pet'r Appx. Ex. 4 at 5, and that Mr. Santer has a "neurological disorder[.]" *Id.* at 2.

On June 10, 2008, the DMV suspended Mr. Santer's driver's license, with an effective suspension date of June 15, 2008. Pet'r Appx. Ex. 5. Mr. Santer requested a hearing on his suspension, Pet'r Ex. 6, which the DMV pended until its receipt of the recommendation of the Division's Driver's License Advisory Board. Pet'r Appx. Ex. 7.¹

Mr. Santer filed a Petition for a Writ of Prohibition with the Circuit Court of Wood County, West Virginia. Pet'r Appx. Ex. 9. Without awaiting a response by DMV, the Circuit Court of Wood County issued a Rule to Show Cause and specifically prohibited the DMV from suspending Mr. Santer's license. Pet'r Appx. Ex. 10. The DMV filed a motion to dismiss, arguing that the Circuit Court of Wood County lacked both jurisdiction and venue under *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005) and *Stewart v. Alsop*, 207 W. Va. 430, 533 S.E.2d 362 (2000) (per curiam). Pet'r Appx. Ex. 11. After a response by Mr. Santer which did not cite (much less distinguish) *Stump* and *Stewart*, Pet'r Appx. Ex. 12, the circuit court held the motion to dismiss in abeyance and has yet to rule on the motion to dismiss.

III.

STANDARDS FOR GRANTING THE WRIT

West Virginia Code § 53-1-1 (1923) (Repl. Vol.2000) provides that "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." "[T]his Court will use prohibition . . . to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which

¹The DMV medical reports are contained as Exhibit 8 to the Petitioner's Appendix of Exhibits.

may be resolved independently of any disputed facts and only in cases where there is a high probability . . . [of reversal] if the error is not corrected in advance.” Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). Indeed, “[t]his Court [has] recognized the appropriateness of prohibition as a remedy to situations where the lower court lacked jurisdiction by stating:

‘[w]hen a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right, regardless of the existence of other remedies, and regardless of whether or not the objections to the jurisdiction of the trial court have been presented to that court prior to the application for relief here.’”

State ex rel. Smith v. Thornsbury, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003) (quoting *Morris v. Calhoun*, 119 W. Va. 603, 608, 195 S.E.2d 341, 345 (1938) (internal citations omitted)). And, “[i]n recent times in every case that has had a substantial legal issue regarding venue, we have recognized the importance of resolving the issue in an original action. Accordingly, we find the exercise of original jurisdiction is appropriate under these extraordinary circumstances.” *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995).

IV.

REASONS FOR GRANTING THE WRIT

“‘Jurisdiction’” relates to the power of a court, board, or commission to hear and determine a controversy presented to it, and not to the right of recovery as between the parties thereto.” Syl. Pt. 1, *Fraga v. State Comp. Comm’r*, 125 W. Va. 107, 23 S.E.2d 641 (1942). “To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” *West Virginia Sec. Sch. Act. Comm’n v. Wagner*, 143 W. Va. 508, 520-21, 102 S.E.2d 901, 909

(1958). “[A]ny judgment or decree rendered without such jurisdiction will be utterly void.” Syl. Pt. 1, in part, *Schweppes U. S. A. Ltd. v. Kiger*, 158 W. Va. 794, 794, 214 S.E.2d 867, 868 (1975), *overruled on other grounds by S. R. v. City of Fairmont*, 167 W. Va. 880, 280 S.E.2d 712 (1981). *See also Syl. Pt. 3, Duncan v. Tucker County Bd. of Ed.*, 149 W. Va. 285, 140 S.E.2d 613 (1965) (“Proceedings had in a court which has not acquired jurisdiction in a manner recognized by law are void and a nullity.”); *St. Lawrence Boom & Mfg. Co. v. Holt*, 51 W. Va. 352, 41 S.E. 351, 356 (1902) (“the court itself cannot act except upon its own intrinsic authority in matters of jurisdiction; and every excess will amount to a usurpation, which will make its decretal orders a nullity, or infect them with a ruinous infirmity.”). This case presents issues of clear error in that the Circuit Court of Wood County lacked both subject matter jurisdiction and personal jurisdiction (due to a lack of venue) over the purported writ of prohibition.

Additionally, the circuit court’s void and illegitimate order allows Mr. Santer to continue to drive despite his medical condition, and the threat it poses to himself and others. *See, e.g., Oleszczuk v. State*, 604 P.2d 637, 640 (Ariz. 1979) (prohibiting drivers who suffer from epilepsy, seizures, or fainting spells from driving is designed to protect people who might be injured in an automobile accident as a result of a driver suffering such a spell). Thus, the DMV requests that the Court immediately issue a Rule to Show Cause which would stay the circuit court order allowing Mr. Santer to drive any motor vehicles and, subsequently, issue a writ of prohibition against the Circuit Court of Wood County preventing it from entertaining any extraordinary remedies proceedings relating to Mr. Santer’s license suspension.

A. The Circuit Court of Wood County lacks jurisdiction.

West Virginia Code § 53-1-2 provides, in pertinent part, that “[j]urisdiction of writs of . . .

prohibition . . . shall be in the circuit court of the county in which the record or proceeding is to which the writ relates.” This Court has dealt with the precise issue that this case raises—whether any county other than Kanawha County enjoys jurisdiction over an extraordinary writ directed at the DMV to interfere with the DMV’s duties to remove driver’s from the roads who pose a threat to the health and safety of themselves and others. In *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005), a petitioner sought a writ of prohibition in Nicholas County to stop a license revocation hearing. 217 W. Va. at 736, 619 S.E.2d at 249. The DMV filed a petition for a writ of prohibition in this Court arguing that the Circuit Court of Nicholas County lacked jurisdiction under Code § 53-1-2. The DMV asserted that the “record” underlying the prohibition was the driver’s license that the respondent wanted restored and that that “record” was located in Kanawha County. This Court agreed finding that “the ‘record’ (the driver’s license . . .) to which [the] mandamus/prohibition circuit court action ‘relate[d]’ [wa]s in Kanawha County” so that “the Circuit Court of Nicholas County lacked jurisdiction to proceed with [the] circuit court action under the provisions of W. Va. Code § 53-1-2(1933).” *Id.* at 739, 619 S.E.2d at 252. As in *Stump*, the record at issue here is a driver’s license, and, as in *Stump*, the location of that record is in Kanawha County. Thus, the circuit court lacks jurisdiction, precisely the situation a writ of prohibition is meant to correct. This Court should issue the writ. *Cf. State ex rel. Shrewsberry v. Hrko*, 206 W. Va. 646, 651, 527 S.E.2d 508, 513 (1999) (per curiam) (Starcher, C.J., concurring) (“Once a court discovers it does not have subject-matter jurisdiction of a particular case, it ceases to have any power to rule and must dismiss the case.”).

B. The Circuit Court of Wood County lacks venue and, thus, personal jurisdiction.

West Virginia Code § 14-2-2(a)(1) provides, “[t]he following proceedings shall be brought

and prosecuted only in the circuit court of Kanawha county: Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.” “[V]enue is a matter of legislative determination. When the Legislature speaks, through a constitutionally valid statute, in clear language, that actions against state officers shall be in Kanawha County, venue must be there required by the Court.” *State ex rel. Ritchie v. Triplett*, 160 W. Va. 599, 605, 236 S.E.2d 474, 478 (1977). Thus, this Court has “long recognized that “[a]ctions wherein a state agency or official is named, whether as a principal party or third-party defendant, may be brought only in the Circuit Court of Kanawha County.” *State ex rel. Stewart v. Alsop*, 207 W. Va. 430, 434, 533 S.E.2d 362, 366 (2000) (per curiam) (citation omitted). Again, *Stump* is dispositive. In *Stump*, this Court concluded that a mandamus/prohibition against the DMV must be brought in Kanawha County. *Stump*, 217 W. Va. at 740-41, 619 S.E.2d at 253-54. Thus, the circuit court lacks jurisdiction because it lacks venue. *Wagner*, 143 W. Va. at 520, 102 S.E.2d at 909 (“[A] court in a county in which venue of an action does not lie does not acquire jurisdiction of the defendant in such action.”). This Court should issue the writ.

V.

CONCLUSION

For the above-reasons, the Court should grant the Petition for a Writ of Prohibition.

Respectfully submitted,

**STATE OF WEST VIRGINIA ex rel.
JOSEPH CICCHIRILLO, Commissioner
of the Division of Motor Vehicles,**

Petitioner

By counsel,

**DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL**



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**MEMORANDUM OF PARTIES UPON WHOM
THE RULE TO SHOW CAUSE SHOULD BE SERVED**

The Honorable J.D. Beane
Judge, Circuit Court of Wood County
Wood County Judicial Annex
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Parkersburg, WV 26101

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Counsel for Respondent Thomas J. Santer

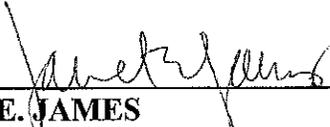
Respectfully submitted,

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By counsel,

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ATTORNEY GENERAL



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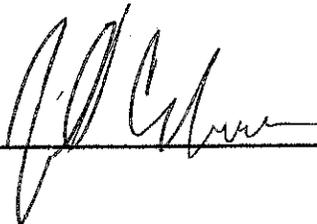
VERIFICATION

STATE OF WEST VIRGINIA;

COUNTY OF KANAWHA, to-wit:

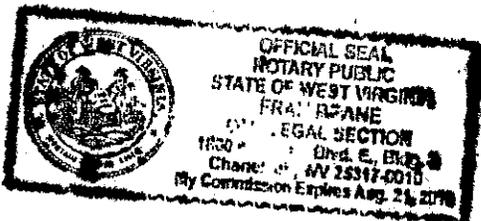
I, Jill C. Dunn, General Counsel for the West Virginia Division of Motor Vehicles, upon being duly sworn, state that I have read and am familiar with the contents of the foregoing "Emergency Petition for a Writ of Prohibition" and that, to the best of my information, knowledge and belief, the facts and allegations set forth therein are true and accurate.

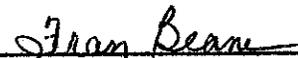
Jill C. Dunn



Taken, subscribed and sworn to before me this 30th day of July, 2008.

My commission expires 8-21-2012.





NOTARY PUBLIC

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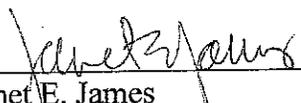
Respondents.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General and Counsel for the Petitioner certify that on the 30th day of July, 2008, I served the foregoing *Emergency Petition for a Writ of Prohibition, Petitioner's Appendix of Exhibits, and Memorandum of Parties Upon Whom the Rule to Show Cause Should be Served*, by depositing true and correct copies thereof in the United States Mail, First Class Postage Prepaid, addressed as follows:

The Honorable J.D. Beane
Judge, Circuit Court of Wood County
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