

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JACOB FREDERICK JOCHUM and
JACOB F. JOCHUM, JR., d/b/a
JACK JOCHUM TRUCK SERVICE,

Appellants,

v.

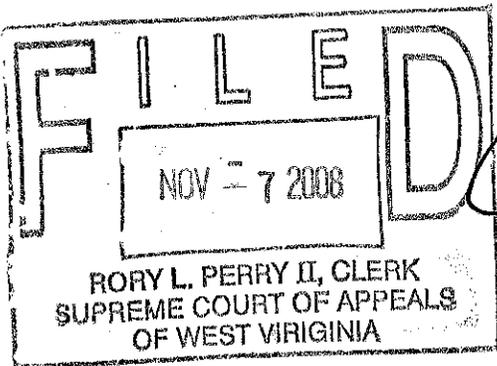
Appeal No. 34264
Hon. Martin J. Gaughan
Circuit Court of Ohio County, WV
Civil Action No.: 06-C-415

WASTE MANAGEMENT OF WEST
VIRGINIA, INC., ET AL.,

Appellees.

BRIEF OF APPELLEE, WASTE MANAGEMENT OF WEST VIRGINIA, INC.

Respectfully submitted:



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I. POINTS AND AUTHORITIES

CASES

Adams v. Guyandotte Valley Ry. Co., 61 S.E.341 (W.Va. 1908).....9

Aetna Casualty and Surety Co. v. Federal Insurance Co. of N.Y., 148 W.Va. 160,
133 S.E.2d 770 (1963).....7

Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992).....7

Atlantic Greyhound Corporation v. Public Service Commission, 132 W.Va. 650, 54 S.E.2d 169
(1949).....20

Berkeley County Public Service District v. Vitro Corp., 162 S.E. 2d 189 (W.Va. 1968).....14

Bethlehem Mines Corp. v. Haden, 172 S.E. 2d 176 (W.Va. 1969).....15

Cline v. Roark, 179 W.Va. 482, 370 S.E.2d 138 (1988).....18

Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987)18

Estate of Tawney v. Columbia Natural Resources, LLC, 633 S.E.2d 22 (W.Va. 2006).....14

James Allen Harper, et al. v. Public Service Commission of West Virginia, et al., 427 F.Supp.2d
707 (S.D. W.Va. 2006).....3

Harris v. Jones, 209 W.Va. 557, 550 S.E.2d 93 (2001).....7

Harrison v. Town of Eleanor, 191 W.Va. 611, 447 S.E.2d 546 (1994).....8

Jividen v. Law, 194 W.Va. 705, 713, 461 S.E.2d 451, 459 (1995).....8

Oakes v. Monongahela Power Co., 158 W.Va. 18, 207 S.E.2d 191 (1974).....7

Orteza v. Monongalia County General Hospital, 318 S.E.2d 40 (W.Va. 1984).....15

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).....7

Price v. Bennett, 171 W.Va. 12, 297 S.E.2d 211 (1982).....7

Payne v. Weston, 195 W.Va. 502, 466 S.E.2d 161 (1995).....8

Shrewsbury v. Humphrey, 183 W.Va. 291, 395 S.E.2d 535 (1990)18

Trumka v. Clerk of the Circuit Court, 175 W.Va. 371, 332 S.E.2d 826 (1985).....18

Vaughan Construction Company v. Virginian Ry. Co., 97 S.E. 278
(W.Va. 1918).....9

Whitlow v. Board of Education of Kanawha County, 190 W.Va. 223, 438 S.E.2d 15
(1993).....18

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995).....7

STATUTES

W.Va. Code §24-2-5.....2

RULES

Rule 56(c), West Virginia Rules of Civil Procedure.....7

II. STATEMENT ON APPELLANTS' ASSIGNMENT OF ERROR

THE CIRCUIT COURT DID NOT ERR IN GRANTING WASTE MANAGEMENT OF WEST VIRGINIA, INC.'S MOTION FOR SUMMARY JUDGMENT ON THE APPELLANTS' BREACH OF CONTRACT AND DETRIMENTAL RELIANCE CLAIMS.

III. STATEMENT OF THE CASE

The case under review involves the application of an unambiguous condition precedent in a contract and the violation of that condition precedent due to a federal court decision which fundamentally changed the regulated environment for interstate solid waste motor carriers in West Virginia, making the consummation of the transaction less economic.

Jacob Frederick Jochum and Jacob F. Jochum, Jr., (the “Appellants”) are residents of Ohio County, West Virginia and operate Jack Jochum Truck Service. See Complaint in Civil Action 06-C-415, at ¶¶ 4, 5. Jack Jochum Truck Service provides waste disposal services in Ohio and Marshall Counties, West Virginia,¹ pursuant to the authority of the West Virginia Public Service Commission (the “WVPSC”). Id. at ¶¶14,15. The WVPSC authorized Appellants to provide waste disposal services pursuant to certain WVPSC Certificates (the “Certificates”). Id.

Beginning in 2002, Appellants sought a purchaser for their waste disposal business and for the transfer of their Certificates. Id. at ¶19. At that time, Appellants entered into negotiations with Waste Management for the purchase of their business and Certificates. Id. On or about March 8, 2004, after extensive negotiation, Appellants and Waste Management executed an Asset Purchase Agreement (“the Agreement”) which provided that, if all of the pre-closing conditions were satisfied, Waste Management would pay to Appellants the sum of \$465,000.00 and the Appellants would assign Waste Management their WVPSC Certificates. Id. at ¶ 20; see also Asset Purchase Agreement.

¹ Importantly, Ohio and Marshall Counties border both the State of Ohio and the Commonwealth of Pennsylvania. Pennsylvania is where Waste Management’s office is located and from which the anticipated solid waste service would have been operated.

The Appellants were well aware of Waste Management's intentions to operate the solid waste disposal services in the two certificated West Virginia counties out of its Washington, Pennsylvania office, thereby operating an "interstate" business. At the time the agreement was entered into by the parties, it was "unlawful for any common carrier by motor vehicle to operate within [West Virginia] without first having obtained from the commission [WVPSC] a certificate of convenience and necessity." W.Va. Code §24-2-5. Therefore, as part of the Agreement between Appellants and Waste Management, the parties specifically agreed that, as one condition precedent, the parties must receive all of the "necessary governmental consents, including the approval of the West Virginia Public Service Commission and the consents to the assignment of Seller's customers including any municipal contracts that may exist." See Asset Purchase Agreement, §9(d).

As another condition precedent, the parties agreed that, prior to closing, "no law, rule, regulation, order, writ or judgment of any court, arbitrator or other agency of government or any agreement to which Buyer [Waste Management] or an affiliate of Buyer is bound shall have prevented or prohibited or make less economic the consummation of the transactions contemplated hereby." See Asset Purchase Agreement, §9(e). The Appellants knew that, at that time, although a Certificate was required in order to operate as an interstate hauler, pending litigation before the United States District Court for the Southern District of West Virginia, (subsequently decided, before closing, in James Allen Harper, et al. v. Public Service Commission of West Virginia, et al., 427 F.Supp.2d 707 [S.D. W.Va. 2006] [the "Harper case"]) could change that requirement. See December 13, 2004 Hearing Transcript in Case Nos. 04-

0421-MC-TC-AC, 04-0422-MC-TC-AC and 04-0508-MC-TC-AC, at p. 71, attached hereto as Exhibit A.

In order to meet the requirement under §9(d), on March 22, 2004, the Appellants and Waste Management initiated proceedings before the WVPSC to obtain approval of the transfer of the Certificates. See Complaint, at ¶22. Waste Management spent considerable time and expense in this effort, which was protested by another existing regulated hauler in the area, American Disposal Services of West Virginia, Inc. (“ADS”) It is not uncommon for such matters to be protested, as Certificates at that time were quite valuable since they limited competition in the authorized area. On December 28, 2005, the WVPSC issued an Order granting approval of the transfer of the Certificates to Waste Management. Id. at ¶31. ADS petitioned this Court to hear an appeal of the WVPSC Order. This petition was not denied until June 6, 2006. Id. at ¶40.

On April 11, 2006, while the issue of the WVPSC approval of the transfer (the §9(d) condition precedent) was still being resolved, the United States District Court for the Southern District of West Virginia issued an opinion in the Harper case. The court held that W.Va. Code § 24A-2-5 was unconstitutional and that the WVPSC could not require solid waste haulers who cross state lines in the transportation of solid waste to obtain a certificate of convenience and necessity before operating in West Virginia. Due to the Harper decision, the market value of the transaction between Waste Management and Appellants was significantly altered and reduced and the proposed transfer was made less economic. The issuance of the Harper decision fell squarely within the terms of §9(e) of the agreement and prevented the fulfillment of that condition precedent.

On April 26, 2006, Waste Management gave notice to the Appellants of its termination of the Agreement due to the failure of the §9(e) condition precedent in light of the fact that the recent decision in Harper had made the consummation of the Agreement significantly less economic. See Complaint at ¶36. As a result of this development, the WVPSC petition of Appellants and Waste Management concerning the approval of the transfer was reviewed by the WVPSC, which determined that “the federal court order in Harper affects the value of the Jochum certificates.” See December 11, 2006 Commission Order of the WVPSC, Case Nos. 04-0421-MC-TC-AC, 04-0422-MC-TC-AC and 04-0508-MC-TC-AC attached hereto as Exhibit B. Pursuant to §9(e) of the Agreement, the WVPSC determined that, since the proposed transfer had not been completed, and since the Harper decision affected the value of Appellants’ Certificates, the transfer should not proceed and the application and petition of Appellants should be dismissed. See Exhibit B. Importantly, the Appellants did not petition to appeal the WVPSC’s Order.

On November 6, 2007, the Appellants filed a Complaint in the Circuit Court of Ohio County, alleging that Waste Management breached the Agreement by terminating the contract. See Complaint. On February 22, 2007, Waste Management filed a Motion for Summary Judgment in which it argued that there was no genuine issue of material fact with regard to any of the matters set forth in the Appellants’ Complaint and that Waste Management was entitled to judgment as a matter of law. On October 1, 2007, the Circuit Court of Ohio County entered an Order granting Waste Management’s Motion for Summary Judgment, finding that two conditions precedent to the contract, §§9(d) and 9(e) had not been satisfied. See Order in Civil Action No. 06-C-415. Specifically, the lower court found that “no dispute exists as to the facts

material to the adjudication of the issues in this case: whether Defendant breached the Agreement with the Plaintiffs, whether §9(e) of the Agreement is ambiguous, and whether a law was passed making the sale of Plaintiffs' business less economic." Id. On February 1, 2008, the Appellants filed a petition for appeal of the circuit court's Order.

IV. ARGUMENT

A. **Standard of Review**

The West Virginia Supreme Court of Appeals reviews summary judgments under a *de novo* standard. Harris v. Jones, 209 W.Va. 557, 550 S.E.2d 93 (2001); Syllabus Point 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Summary judgment is a device “ ‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial’, if in essence there is no real dispute as to salient facts or if only a question of law is involved.” Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, 758 n. 5 (1994)(quoting Oakes v. Monongahela Power Co., 158 W.Va. 18, 207 S.E.2d 191 (1974)). A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 3, Aetna Casualty and Surety Co. v. Federal Insurance Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963). See also Syl. Pt. 2, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994); Syl Pt. 1, Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, Price v. Bennett, 171 W.Va. 12, 297 S.E.2d 211 (1982). Specifically, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), West Virginia Rules of Civil Procedure.

The West Virginia Supreme Court of Appeals has stated, in Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995), that there is no need for a circuit court to wait until after evidence has been received at trial where only a question of law is involved. Summary

judgment is simply another method enabling courts to make legal determinations. Harrison v. Town of Eleanor, 191 W.Va. 611, 447 S.E.2d 546 (1994). Indeed, "[w]here the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." Payne v. Weston, 195 W.Va. 502, 466 S.E.2d 161 (1995)(where the only issue before the Court was a legal question, the matter was ripe for summary judgment).

Justice Cleckley, writing for a unanimous Court, stated that "[t]he circuit court's function at this stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is genuine issue for trial." Syl. Pt. 3, Painter, 192 W.Va. 189, 451 S.E.2d 755 (1994)(emphasis added). Enforcing the Painter decision, Justice Workman reaffirmed the utility of summary judgment, stating that "Rule 56 was incorporated into West Virginia civil practice for good reason, and circuit courts should not hesitate to summarily dispose of litigation where the requirements of the Rule are satisfied." Jividen v. Law, 194 W.Va. 705, 713, 461 S.E.2d 451, 459 (1995). As demonstrated herein, the circuit court properly found that there is no genuine issue of material fact with respect to whether Waste Management breached the Agreement with Appellants. The requirements of Rule 56(c) having been met, the trial court correctly held that Waste Management was entitled to summary judgment as a matter of law.

B. The Circuit Court Did Not Err in Granting Summary Judgment as No Genuine Issue of Material Fact Exists as to Whether Waste Management Properly Terminated the Asset Purchase Agreement.

The lower court correctly ruled that, because certain conditions precedent had not been met, Waste Management did not breach the Agreement and no genuine issue of material fact existed in this regard. The circuit court quoted this Court's finding that "where parties to a

contract have specified therein the conditions which an action upon the contract may be maintained, such conditions precedent generally must be complied with before an action for breach of contract may properly be brought.” Syllabus Pt. 1, Vaughan Construction Company v. Virginian Ry. Co., 97 S.E. 278 (W.Va. 1918). Further, there can be no breach of contract when a contract is cancelled due to the failure to satisfy a condition precedent because no rights have been vested during the time such condition was to have been performed. Adams v. Guyandotte Valley Ry. Co., 61 S.E.341 (W.Va. 1908). As set forth below, certain conditions precedent were not met, and Waste Management properly and lawfully terminated the contract.

1. The Circuit Court Properly Held that No Genuine Issue of Material Fact Exists as to Whether §9(e) of the Asset Purchase Agreement Was Violated.

The Agreement contained a number of conditions precedent, the principal one at issue being:

All obligations of Buyer to closer hereunder are subject to fulfillment by Seller or waiver by Buyer, prior to or on the date of Closing, of the following conditions:

...

- (e) No law, rule, regulation, order, writ or judgment of any court, arbitrator or other agency of government or any agreement to which Buyer or an affiliate of Buyer is bound shall have prevented or prohibited or make less economic the consummation of the transactions contemplated hereby.

See Asset Purchase Agreement, §9(e). The lower court held that the decision in Harper rendered the Appellants’ Certificates unnecessary for the transportation of solid waste across state lines, thereby making the Agreement “less economic”. The WVPSC also found that the Harper decision rendered the Certificates less economic and cancelled the transfer of the Certificates.²

² Decisions of administrative agencies are given great deference. Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996); Hudkins v. State Consolidated Public Retirement Board, 220 W.Va. 275, 647 S.E.2d 711 (2007).

See Exhibit B. Contrary to the Appellants' arguments, the lower court properly ruled that there was no genuine issue of material fact that this condition precedent was unsatisfied/violated and, therefore, Waste Management was entitled to summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.

The Appellants argue in their brief that a genuine issue of material fact exists as to whether §9(e) of the Agreement was violated because Waste Management "intentionally chose to use the ambiguous term "less economic" to bind the Jochums to the purchase agreement and prevent them from negotiating with Waste Management's competitors and, at the same time, maintain the option of voiding the agreement if Harper was decided in its favor." See Appellants' Brief at p. 10. The Appellants appear to claim that they were ignorant of the pending litigation in the Harper case and never contemplated that the broad language of §9(e) could apply to cover such situations. This argument appears to be disingenuous since Jack Jochum, Jr. testified before the WVPSC in 2004 regarding the interstate hauling issue and the pending litigation as to whether such haulers require a Certificate. See Exhibit A at p. 71. The Appellants knew that a decision could be issued in the Harper case that would render their Certificates unnecessary to Waste Management and, thus, relatively valueless because no interstate operator would need to obtain a Certificate and the Certificates would therefore convey no valuable right to limited competition. The resolution of the Harper case was the kind of development expressly contemplated by §9(e) in the Agreement. The Appellants understand the common carrier business and were well aware of the interstate hauling issue. See Exhibit A at p. 62.

In addition to the disingenuousness of this argument, it is flawed in many aspects. First, as addressed in more detail below, the lower court properly held that the term “less economic” is not ambiguous. Second, Waste Management’s choice of terminology for the Agreement was a good faith effort to include any type of situation that would render the contract less economic, including stating specifically any “law, rule, regulation, order writ or judgment of any court, arbitrator, or other agency of government... .” Clearly, the Harper decision falls within these specified categories, as it was an “order” of a federal “court”. §9(e) could not be any clearer as to the types of occurrences which might render the transaction less economic. The Appellants argue that, because Waste Management was concerned about what decision might be rendered in Harper instead of using the term “less economic” in §9(e), it should have stated “made the Jochum’s PSC certificates unnecessary.” However, §9(e) is nowhere near as narrow as Appellants contend. Section 9(e) was obviously intended to cover a number of scenarios, not just the outcome of Harper, and not just the situation that would have made the Appellants’ certificates unnecessary. Section 9(e) is broad; it is not ambiguous. It is broad because the parties agreed that developments of any of the kinds specified that would render the consummation of the transaction “less economic” were to be the risk of the seller prior to closing and the risk of the buyer after closing.

For example, in the purchase of a home, it is often provided that the risk of casualty loss remains with the seller prior to closing and passes to the buyer at closing. If the house burns down the day before closing, the buyer is not compelled to pay the agreed purchase price for a pile of charred timbers. On the other hand, if the house burns down the day after closing, even

though it is before the buyer has moved in, or obtained any enjoyment from his new house, the buyer has no right to recover his purchase price.

In the case at bar, the risk of developments of the kind specified which would affect the economics of the transaction were the sellers up until closing and the buyer's thereafter. If the Harper decision had come down after closing and Waste Management discovered that it had acquired Certificates which were unnecessary and which afforded it no protected service territories that would have been Waste Management's bad fortune. That the Harper decision came down before closing was the Appellants' bad fortune. And that is precisely how the parties elected to apportion such risks in their contract by including §9(e).

The Appellants also make a conclusory allegation that "Waste Management's actions violate West Virginia's covenant of good faith and fair dealing", without providing any detail or support about these supposed "actions" and how they were allegedly taken in bad faith. In addition to being outside of the review of this Court, as discussed in more detail below, this is an absurd statement. The Appellants, with the advice of counsel, and Waste Management were engaged in the negotiation of the terms of the Agreement for an entire year. See Exhibit A, at p. 55. After negotiating the terms of the Agreement with Waste Management, the Appellants entered into the Agreement voluntarily, knowingly and intelligently. Waste Management did nothing more than comply with the precise terms of the contract and exercise its contractual rights under the condition precedent requirements. Not only did Waste Management follow the only obvious meaning of the clear terms of the contract, WVPSC agreed with its application of the condition precedent, and cancelled the consummation of the Agreement and stated that the transaction had been made less economic under Harper. See Exhibit B. The Appellants stated

that they had 4-5 other interested parties to whom they could have sold their business had it not been for the Agreement with Waste Management. They are clearly disgruntled and are using this forum as a means to punish Waste Management for doing nothing more than abiding by the terms of the Agreement. Ironically, as much as the Appellants complain that they have suffered from the termination of the Agreement, they also claim their business has since flourished and is more profitable than ever. See Appellants' Brief at p. 14.

There is no basis whatsoever for entertaining Appellants' fanciful speculation that Waste Management was operating with the sinister purpose of trying to "bind the Jochums to the agreement and prevent them from negotiating with Waste Management's competitors, and, at the same time, maintain the option of voiding the contract if Harper was decided in its favor." Appellants' Brief at p. 11. Indeed, the Appellants are plainly wrong in supposing that the Harper decision was favorable to Waste Management. Waste Management has spent large sums over the past couple of decades acquiring Certificates in West Virginia. It has gone on the record in several proceedings opposing the legal principle which the federal district court endorsed in Harper. Indeed, there can be little doubt that Waste Management suffered a far greater financial impact to the value of a great number of its West Virginia Certificates than the Appellants did. All solid waste motor carriers, the Appellants, Waste Management, and other competitors who might have been interested in acquiring the Appellants' authority, were essentially in the same boat, facing the prospect of increased competition and diminished usefulness and value of certificated existing authority if Harper were decided the way it was in fact decided. There is no reason to suppose that any other possible purchaser of the Appellants' authority wouldn't have sought the same kind of protection against unfavorable legal contingencies that Waste

Management and the Appellants agreed to. But none of these issues were explored before the trial court because the Appellants' failed to raise this new argument until this appeal.

a. The Condition Precedent Is Not Ambiguous and No Genuine Issue of Fact Exists as to Whether the Appellants' Interpretation Applies.

The Appellants' argument is based on their unsupported position that the term "less economic" is ambiguous. The Appellants repeat this statement throughout their brief without providing any support for their claim. The term "ambiguity" is defined as language reasonably susceptible to two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Estate of Tawney v. Columbia Natural Resources, LLC, 633 S.E.2d 22 (W.Va. 2006). This Court has previously held that the mere fact that parties do not agree to the construction of a contract does not render it ambiguous. Further, the question as to whether a contract is ambiguous is a question of law to be determined by the court. Berkeley County Public Service District v. Vitro Corp., 162 S.E. 2d 189 (W.Va. 1968). Clearly, summary judgment in Waste Management's favor was appropriate here as this issue is not a question of fact, but a question of law that was correctly decided by the court below.

As the lower court held, §9(e) is unambiguous. Specifically, the lower court stated the following:

Section 9(e) of the Agreement states that "No law . . . writ of judgment of any court, . . . shall have prevented or prohibited or make *less economic* the consummation of *the transactions* contemplated hereby." (emphasis added). This Court can only interpret §9(e) of the Agreement to mean that any new law created between the time of the parties' agreement and its closing date that decreases the value of the parties' "transaction", which is the sale of the Plaintiffs' business to Defendant, is a violation of Defendant's conditions to closing. This Court finds that §9(e) of the Agreement refers to the economic environment in general during the time before closing of the Agreement and does not refer to future speculative profits or losses from Plaintiffs' business.

See October 1, 2007 Order. “Where the terms of a contract are clear and unambiguous, they must be applied and not construed.” Syllabus Pt.2, Orteza v. Monongalia County General Hospital, 318 S.E.2d 40 (W.Va. 1984) (quoting Syllabus Pt. 2, Bethlehem Mines Corp. v. Haden, 172 S.E. 2d 176 (W.Va. 1969). Section 9(e) has a plain and unambiguous meaning as argued by Waste Management and as held by the lower court. Appellants’ interpretation of §9(e) is not a compelling interpretation of an ambiguous term, but an unwarranted attempt to mystify and narrow the plain meaning of a clear and unambiguous term.

b. The Condition Precedent Clearly Applies When the Consummation of the Transaction Is Made Less Economic.

The Appellants argue that §9(e) of the Agreement applies only to situations in which profits will be decreased, and that Waste Management has not shown that Harper would have decreased its profits or would have increased its costs of doing business. First, the Appellants are absolutely incorrect in their interpretation of the condition precedent. Section 9(e) does not apply to situations in which profits would be decreased, as the Appellants wish this Court to find. Section 9(e) is clear. It states that “no law . . . shall make *less economic the consummation of the transactions* hereby contemplated.” These words are unambiguous and can only be interpreted to apply to the consummation of the transaction (i.e., the Agreement) and not to any projected future profits following the consummation. The WVPSC agreed with Waste Management’s application of §9(e) and revoked its approval of the transfer of the Certificates (thus resulting, of course, in the failure of condition precedent §9(d) as well). The Appellants failed to appeal the WVPSC Order. As far as §9(d) is concerned, the Appellants had only one avenue of relief if they took issue with the WVPSC’s December 28, 2006 Order, petitioning for review by this Court. They failed to do so and thus have no valid response to the fact that the

transaction now cannot be consummated because the Appellants' Certificates cannot lawfully be transferred to Waste Management. Instead of seeking an appeal, the Appellants filed the action below, where the lower court also agreed with Waste Management's and the WVPSC's application of §9(e).

The Appellants have attempted to interpret this language rather than apply its plain meaning, and have provided no support for their interpretation. The Appellants argue that Waste Management's interpretation would allow it to back out of the deal simply because it found a way of doing business similar to the Jochum's more cheaply. This is entirely incorrect; it over simplifies the issue and misunderstands the Harper decision. The value of the Appellants' Certificates was the heart of the Agreement and the Appellants were well aware of this fact when the Agreement was negotiated. The value of the Certificates is also evidenced by the lengthy and adversarial proceedings before the WVPSC and this Court in order to obtain approval of their transfer.

The Appellants argue that the profitability of the area subject to its Certificates depends on the Appellants' customer base, not the Certificates. See Brief at p. 14. What the Appellants fail to recognize is that, prior to the decision in Harper, a new hauler wishing to compete in the Appellants' territory would have absolutely no legal right to provide service to any customers, thus making those Certificates (i.e. the legal right to service the customers) the most valuable asset in the Agreement. Prior to Harper, a customer base was meaningless without a Certificate that provided the authority to serve that customer base. When Harper repudiated the need to obtain a Certificate for interstate haulers, the transaction became significantly less economic for Waste Management.

Based upon their argument that the term “less economic” means less profitable, the Appellants argue that Harper did not cause any decrease in their profit. That statement in and of itself shows the Appellants’ misunderstanding of the core issue in this case. Whether or not the Appellants’ business was profitable is not the issue here. The issue is that the previous need to obtain legal authority to provide interstate service to those customers is no longer necessary due to the Harper decision. The Appellants admit that “Waste Management was to receive the right to service these customers.” See Appellants’ Brief at p. 14. That right was in the form of Certificates. Those Certificates are no longer necessary or valuable. The customers of the Appellants are, at best, a temporary benefit. Those customers are under no compulsion to continue indefinitely as customers of a new entity acquiring the Appellants’ business instead of electing to be served by some other new competing interstate solid waste hauler. Those Certificates were the most valuable asset to be purchased. Because those Certificates are not valuable to Waste Management now, because both Waste management and other interstate haulers now have the right to compete to serve the Appellants’ customers without Certificates, the transaction was made decidedly less economic. The profitability of the business after the Harper decision is not determinative of whether §9(e) was satisfied. In anything, the resulting profitability simply shows that the Appellants have not been harmed by the termination of the Agreement: however, whether or not the termination was harmful or displeasing to the Appellants is of no legal consequence since Waste Management had the legal right to terminate the Agreement.

2. No Genuine Issue of Material Fact Exists Whether §9(e) Applies Regardless of Whether It Was Satisfied.

In addition to their arguments that the term “less economic” is ambiguous and really means less profitable, the Appellants have included a completely irrelevant argument that regardless of whether §9(e) was satisfied, Waste Management was required to comply with the Agreement (as if §9(e) was not a part of it) under the covenant of good faith and fair dealing. This is the first time in this matter that the Appellants have made such an argument and this was not an issue before the lower court. This Court’s review is limited to the lower court’s finding that there was no genuine issue of material fact that the conditions precedent were violated. This Court has held that “our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.” Whitlow v. Board of Education of Kanawha County, 190 W.Va. 223, 438 S.E.2d 15 (1993); Shrewsbury v. Humphrey, 183 W.Va. 291, 395 S.E.2d 535 (1990); Cline v. Roark, 179 W.Va. 482, 370 S.E.2d 138 (1988); Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987); Trumka v. Clerk of the Circuit Court, 175 W.Va. 371, 332 S.E.2d 826 (1985). The lower court never considered the issue of whether §9(e) was applicable because it would have violated the covenant of good faith and fair dealing. Therefore, the issues of whether or not §9(e) applies considered in conjunction with whether Waste Management’s actions violated the covenant of good faith and fair dealing should not be considered on appeal.

Notwithstanding the irrelevance of this argument, it is completely without merit. The Appellants argue that Waste Management was required under the covenant to notify them of the pending litigation at the time of, or prior to, the execution of the Agreement. The Appellants provide no support for this argument other than citing to a case that states that good faith and fair

dealing should call for the performance of a contract. But, of course, §9(e) is part of this contract. The Appellants had the support of counsel in negotiating the terms of the contract, which took an entire year. Thus, the Appellants entered into the Agreement voluntarily, knowingly, and with the advice of counsel.

In addition, §9(e) represents a common contractual provision which apportions risk in sales agreements. Section 9(e) provided a method to apportion risk to the Appellants prior to the closing of the Agreement, if certain conditions precedent were not met. If the Agreement had already closed, such risk would have been shifted to Waste Management. These types of provisions are extremely common in any sales contract. Waste Management did nothing more than comply with those terms. It in no way acted unfairly or in bad faith. Interestingly, the Appellants' claim that Waste Management should not be allowed to benefit to the "detriment" of the Appellants, after just stating in previous paragraphs in its brief that its business is booming and increasingly becoming more profitable. Which poses the question: what detriment have the Appellants suffered? The Appellants' arguments are inconsistent and illogical.

3. No Genuine Issue of Material Fact Exists as to Whether Condition 9(d) Allowed the Asset Purchase Agreement to Be Terminated By Waste Management.

Lastly, the Appellants argue that a genuine issue of material fact exists as to whether §9(d) of the Agreement excused Waste Management from complying with the contract. Section 9(d) states as follows:

Seller and Buyer shall have received all necessary governmental consents, including the approval of the West Virginia Public Service Commission and the consents to the assignment of Seller's customers including any municipal contract that may exist.

The Appellants argue that §9(d) had already been satisfied in that government approval had been received prior to the Harper decision and, therefore, that it did not excuse Waste Management from complying with the contract. Specifically, the Appellants argue that government approval was issued in December 2005, when the WVPSC approved the transfer of the certificates. This argument is irrelevant. It makes no difference when government approval was granted as §9(e) was not satisfied prior to closing. Based on that fact alone, the contract was properly terminated according to its terms.

Nonetheless, the Appellants are incorrect in their claim that governmental approval was granted in December 2005. The appellants claim that because Waste Management and American Disposal Services, Inc. (the party who appealed the WVPSC decision) failed to request a stay that approval was granted in December 2005. Whether or not a stay was requested is irrelevant. Government approval for the transfer of the Certificates was not final in December 2005 as there was a pending appeal of the WVPSC Order. An order of the WVPSC is subject to review of this Court and will be reversed and set aside if the findings are not supported by evidence or if they are based upon a mistake of law. Atlantic Greyhound Corporation v. Public Service Commission, 132 W.Va. 650, 54 S.E.2d 169 (1949). Final governmental approval for the transfer of the Certificates was dependant on the outcome of the petition of appeal filed by ADS. Therefore, the WVPSC's approval was not finalized until June 9, 2006, when this Court denied the petition for appeal of the WVPSC's Order granting the transfer of the Certificates. The Harper decision was issued on April 11, 2006. At the time the Harper ruling was decided, the issue of whether the transfer of the Certificates would gain governmental approval was still undecided, thus failing to satisfy §9(d) of the Agreement. And that approval has subsequently

been rescinded. But the Appellants now ask for their benefit from a bargain which they are legally incapable of fulfilling: they cannot lawfully transfer their Certificates to Waste Management. The lower court properly held that no genuine issue of material fact exists on this issue.

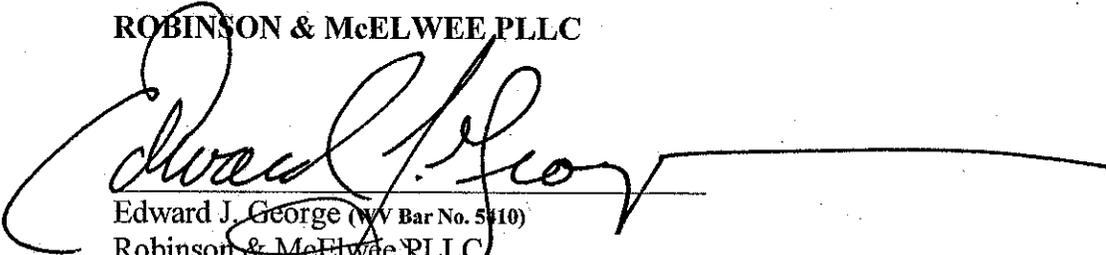
IV. CONCLUSION

WHEREFORE, the Appellee, Waste Management, respectfully requests that the Appellants' appeal be denied and that this Court uphold the Order entered on October 1, 2007 by the Circuit Court of Ohio County granting summary judgment to Waste Management.

**WASTE MANAGEMENT OF WEST
VIRGINIA, INC.**

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JACOB FREDERICK JOCHUM and
JACOB F. JOCHUM, JR., d/b/a
JACK JOCHUM TRUCK SERVICE,

Appellants,

v.

Appeal No. 34264
Hon. Martin J. Gaughan
Circuit Court of Ohio County, WV
Civil Action No.: 06-C-415

WASTE MANAGEMENT OF WEST
VIRGINIA, INC., ET AL.,

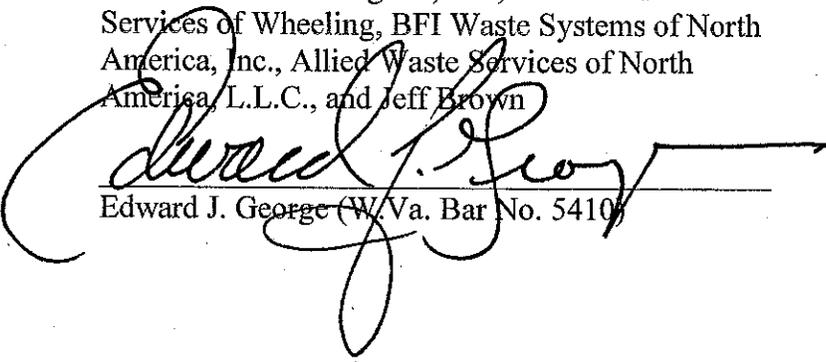
Appellees.

CERTIFICATE OF SERVICE

I, Edward J. George, counsel for Waste Management of West Virginia, Inc., do hereby certify that a true and exact copy of the foregoing **BRIEF OF APPELLEE, WASTE MANAGEMENT OF WEST VIRGINIA, INC.** have been served upon counsel of record this 7th day of November, 2008 via certified U.S. mail, postage prepaid, addressed as follows:

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EXHIBITS
ON
FILE IN THE
CLERK'S OFFICE