

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

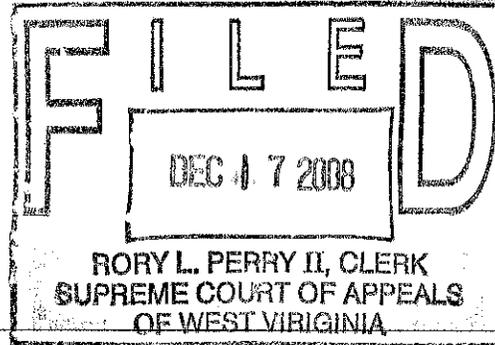
Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

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



**REPLY BRIEF OF JACOB FREDERICK JOCHUM,  
and JACOB F. JOCHUM, JR., d/b/a JACK JOCHUM TRUCK SERVICE  
TO BRIEF OF APPELLEE, WASTE MANAGEMENT OF WEST VIRGINIA**

NOW COME Jacob Frederick Jochum, and Jacob F. Jochum, Jr., d/b/a Jack Jochum Truck Service (“the Jochums”), by counsel, and reply to Waste Management’s appellate brief as follows:

**I. THE COURT SHOULD REVERSE THE TRIAL COURT’S SUMMARY JUDGMENT RULING REGARDING PROVISION § 9(E) BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER OR NOT IT WAS SATISFIED, VIOLATED OR EVEN APPLICABLE.**

- (A) A genuine issue of material fact exists because: Waste Management intentionally chose to use the ambiguous terms “less economic” 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; and its bad faith conduct violated the covenant of good faith and fair dealing which required Waste Management to comply with the Agreement.

The Jochums argued that Waste Management intentionally chose to use the ambiguous terms “less economic” to bind them to the Agreement and prevent them from negotiating with Waste

Management's competitors<sup>1</sup> and, at the same time, maintain the option of voiding the contract if *Harper v. Public Service Commission of West Virginia*, 427 F. Supp.2d 707 (S.D. W.Va., 2006) ("*Harper*") was decided in its favor.

Waste Management previously represented that "It was at the December 13, 2004 hearing that Waste Management first put the parties on notice that there was pending litigation which may affect the status of ongoing contract negotiations among the parties." Waste Management's Summary Judgment Reply, at 2. In its attempt to escape responsibility, Waste Management now falsely represents that when the Jochums executed the Agreement in March, 2004, they knew about *Harper* and that it excused Waste Management's performance under § 9(e):

**At the time the agreement was entered into by the parties....**

...

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(d). 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.

Waste Management's Appellate Brief, at 6<sup>2</sup> (bold emphasis added).

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Waste Management is a competitor of ADS. Waste Management's Answer, at ¶ 13. ADS was a prospective buyer of the Jochum business. EXHIBIT A, pertinent parts of the December, 2004 hearing transcript, at 54.

2

Waste Management also contradicts itself by arguing that the Jochums were well aware of its intentions to operate its waste disposal services from its Washington, Pennsylvania office, but fails to explain why it "Denies that it operates a hauling and disposal business in Washington, Pennsylvania." *Cf.* Waste Management Appellate Brief, at 5, with its Answer, at ¶ 12.

The Jochums were not aware of the *Harper* case when they executed the subject Agreement. Unlike Waste Management, which admitted that "...the Harper decision was an anticipated difficulty [that] resulted in the inclusion of Section 9(e) in the Agreement", the Jochums neither understood, nor intended § 9(e) to allow Waste Management's repudiation based on *Harper's* outcome. See Waste Management's Petition Response, at 12; Jack Jochum Affidavit, at ¶ 6 (Exhibit 2 to the Jochums' Appellate Brief). And for good reason: Waste Management intentionally drafted § 9(e) not to reference certificates or *Harper*, and the Agreement not to define "less economic." The Jochums had a right to assume that Waste Management was bargaining in good faith and if Waste Management was going to make the contract contingent on *Harper*, it would have said it in the contract. See *McBee v. Deussenberry*, Syl. Pt. 1, 99 W.Va. 176, 128 S.E. 378 (1925), reading: "One to whom a representation has been made as an inducement to enter into a contract has the right to rely upon it ... without making inquiry or investigation to determine the truth thereof." Waste Management is bound by its representations. *Darst v. Evans*, 113 W.Va. 777, 783, 169 S.E. 467 (1933).

By intentionally failing to mention *Harper*, Waste Management misrepresented its intention to use *Harper* to repudiate the Agreement and wrongfully induced the Jochums to enter into an Agreement which prohibited them from contracting with other interested parties. See EXHIBIT B, pertinent parts of the Agreement, at § 17 - "The Seller will not further solicit or respond to outstanding offers, from any person relating to the acquisition of all or substantially all of the capital stock of Seller or all or substantially all of the assets of the Seller...." Although Waste Management now represents that the certificates were the heart of the Agreement, it fails to explain why it didn't draft § 9(e) to reference them or *Harper*. It also fails to explain why it didn't file an *amicus* motion

to set aside the *Harper* decision despite its unsupported assertion that it “has gone on the record in several proceedings opposing the legal principle which the federal district court endorsed in *Harper*.” Cf. EXHIBIT C pertinent portion of *Harper* docket report and EXHIBIT D motion with Waste Management’s Appellate Brief, at 16.

Further, Waste Management intentionally drafted § 9(e) ambiguously and now admits it didn’t notify the Jochums of *Harper* until 9 months after executing the Agreement despite knowing prior to the Agreement’s execution that the Jochums wanted to sell their business for health-related reasons. *See e.g.* EXHIBIT A, at 25-26 reading:

Q. Could you tell, please, Jack, why is it that you at this time have chosen to get out—pretty much out of this business?

A. You can see its my health. I have prostate cancer. I have bursitis; you can see that, that ought to be enough.

And at 54:

Q. Why did you come to the point four years ago that you wanted to sell?

A. Well, four years ago my father was 70, and it was time to start— and I noticed every winter, as we’d go to work until spring, that it was taking its toll on him. As a caring son, I certainly wanted him to be out of the weather, out of the service. He doesn’t have to do this. So then at that time, four years ago, we decided, yes, let’s start looking about selling.

Jack Jochum Sr. also has rheumatoid arthritis. EXHIBIT A, at 44.

Waste Management’s inducement and misrepresentation were material: at least four other businesses - including ADS- were interested in purchasing the Jack Jochum Truck Service. *See* EXHIBIT A, at 54. The Jochums wouldn’t have chosen Waste Management if they had known of *Harper* and that Waste Management would repudiate based on it.

Waste Management’s wrongful repudiation of the subject Agreement prevented the retirement of Jack Jochum, Sr. and forced the family to continue working despite their health

concerns.

Waste Management's argument that damages are somehow lessened because of the continued success of Jack Jochum Truck Service misses the point<sup>3</sup>: Waste Management forced the Jochums to continue their business, to the detriment of Jack Jochum Sr.'s health - it was the Jochums' sacrifice that has kept their business flourishing.

These facts support that Waste Management breached the covenant of good faith and fair dealing.<sup>4</sup> They also support claims for fraudulent inducement of contract, negligent/fraudulent misrepresentation,<sup>5</sup> and WV UCC damages, and a right to sue for damages under the Agreement.

Fraudulent inducement occurs when the allegedly fraudulent act was committed by the defendant; the act was material and false; the plaintiff justifiably relied upon the act; and the plaintiff was damaged because he relied upon it. *White v. National Steel Corp.*, 938 F.2d 474, 490 (4th Cir. 1991) (citing *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66, 69 (1981)).

Time and again, this court, in repeated decisions, has held that misrepresentations made by one party to a contract as of one's own knowledge, intended to be relied

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Similarly, Waste Management also errs in arguing that because the risk of loss due to fire falls on the buyer before the closing in real estate transactions, the risk of Waste Management's repudiation due to *Harper* fell on the Jochums.

In contrast to Agreement § 12, which places the "risk of loss, damage or destruction resulting from fire" on the Jochums, § 9(e) doesn't reference "risk of loss" or *Harper*. EXHIBIT B.

4

The Jochums properly asserted their breach of covenant argument on appeal: The Jochums asked Waste Management at the trial court level when it became aware of *Harper* and it didn't answer. EXHIBIT E, pertinent portions of Waste Management's discovery responses, at 6-7. Only at the appellate level did it divulge that its anticipation of *Harper* resulted in the drafting of § 9(e), giving rise to previously unknown theories of liability, which the trial court was unable to consider.

5

This Court recognizes the torts of negligent and fraudulent misrepresentation. See *Trafalgar House Construction v. ZMM*, 211 W.Va. 578, 583, 567 S.E.2d 294 (2002)(per curiam).

upon by the other party, whereas, the first party was not informed as to the truth or falsity of the representations, is fraudulent in equity, even in the absence of actual fraud.

*Gall v. Cowell*, 118 W.Va. 263, 281, 190 S.E. 130 (1937). And if a representation is made to induce another to act on it, or under circumstances that the party making it must know that the other is likely to act on it, the damaged party will be entitled to recover damages regardless of whether or not the representing party knew the falsity of its statement. *See Lengyel*, at 277.

The Uniform Commercial Code provides remedies for “material misrepresentation or fraud.” W.Va. Code § 46-2-721. And the Agreement gives the Jochums a right “to sue for damages and all reasonable out-of-pocket costs and expenses” since Waste Management “materially breach[ed] its representations or warranties or obligations.” EXHIBIT B, at § 11.

Waste Management should not be allowed to profit through its conduct and ill-gotten gain, and must be required to honor the Agreement.

**(B) A genuine issue of material fact exists because *Harper* did not make the Agreement less profitable.**

Section 9(e) reads:

(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.

Waste Management intentionally drafted § 9(e) ambiguously by not referring to the subject certificates or *Harper*, and by using the amorphous term, “less economic,” without defining it.

The Jochums interpret “less economic” to mean less profitable, due to increased cost of doing business. Jack Jochum Affidavit, at ¶ 6. Consistently, the Webster’s Ninth New Collegiate Dictionary, which this Court used in *Wickland v. American Travellers Life Ins. Co.*, 204 W. Va. 430,

437 n. 16, 513 S.E.2d 657 (1998), defines “economical” as “marked by careful, efficient, and prudent use of resources” and “operating with little waste or at a saving”. An increase in the cost of doing business would result in a decrease in efficiency and in savings (profits). And Waste Management has admitted to the validity of the Jochums’ interpretation. *See* Summary Judgment Reply, at 5 - Waste Management argued that *Harper* “...made the entire area subject to [the Jochums’] Certificates **less profitable.**” (Emphasis added).

Waste Management argues that *Harper* made the Agreement “less economical” because the Jochums’ customers are a “temporary benefit” who “are under no compulsion to continue indefinitely”, and that other interstate waste haulers now have the right to compete for them in light of *Harper*. But the Agreement does not require the Jochums’ customers to indefinitely remain with Waste Management. *See* EXHIBIT B, at § 9, as to Seller’s Conditions, and at § 3(c), providing for an offset to the purchase price if gross revenues don’t average \$15,000 per month for “**the three (3) full calendar months after Closing**” (emphasis added).

Further, “less economic” must be construed with sound waste management business practice. *See e.g. Columbia Gas v. E. I. Du Pont*, Syl. Pt. 3, 159 W. Va. 1, 217 S.E.2d 919 (1975) Any change due to *Harper* would have occurred during the 1<sup>st</sup> month thereafter, but did not: the Jochums’ customers remained with them despite any increased competition resulting from *Harper* because they were properly treated, not because they were compelled. *See* Richard Sterner Affidavit, at ¶ 5(A), (C); and Evelyn Jochum Affidavit, (Exhibits 5 & 4 to the Jochums’ Appellate Brief); EXHIBIT A, at 140-41, at which Waste Management, through its attorney, admits that “At the end of the day, [the Jochums] work all hours of the day, seven days a week, and customers at the end of the day...always are served”. And the Jochums’ profit level has not decreased since *Harper*. *See*

Evelyn Jochum Affidavit, at ¶ 10.

If the Agreement had been consummated, the customers would have remained with Waste Management. Sterner Affidavit, at ¶ 5(A). Without a customer base of its own, Waste Management would incur tremendous expense, and utilize vast amounts of manpower and resources in establishing one. Sterner Affidavit, at ¶ 5(A).

Finally, Waste Management has not introduced the opinion of an industry expert to justify its opposition. *See* EXHIBIT E, at 6.

Therefore, whether or not the consummation of the subject Agreement became “less economic” is a question of fact which should be decided by a jury.

**(C) A genuine issue of material fact exists since res judicata and/or collateral estoppel do not apply.**

After the April, 2006 *Harper* decision, Waste Management wrongfully repudiated the Agreement, and filed petitions with the PSC arguing that *Harper* “significantly alters the market value of the transaction between Waste Management and Jochum to acquire the subject certificates.”

In December, 2006, the PSC issued an order dismissing the Jochums’ PSC certificate transfer cases:

#### CONCLUSIONS OF LAW

...

2. The Commission agrees with Waste Management’s estimation that the federal court order in *Harper* affects the value of the Jochum certificates.

3. Since the proposed voluntary transfer has not been completed, since the *Harper* order has affected the value of the Jochums’ certificates, and since one party is no longer willing to proceed, it is reasonable to dismiss this case....

It did so without an evidentiary hearing, and without consideration of Waste Management’s

bad faith conduct which has finally been brought out.

Waste Management argues that the only way the Jochums could have recovered on their breach of contract claim was to have appealed the December, 2006 Order and that in failing to do so, they forfeited their right to recovery.

Assuming that Waste Management is arguing that the doctrine of issue and/or claim preclusion bars the Jochums, it errs.

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identity of the issues litigated is a key component to application of administrative res judicata or collateral estoppel."

*Vest v. Board of Education*, Syl. Pt. 2, 193 W. Va. 222, 455 S.E.2d 781 (1995).

"Only rarely, if at all, will administrative proceedings provide the same full and fair opportunity to litigate matters as will a judicial proceeding involving the complexity, intensity, and specific inquiries common to a wrongful discharge case" *Page v. Columbia Nat. Resources*, 198 W. Va. 378, 393, 480 S.E.2d 817 (1996).

For example, in *Rowan v. McKnight*, 184 W.Va. 763, 763-64, 403 S.E.2d 780 (1991)(per curiam), McKnight transferred a PSC certificate for transporting mobile homes to the Rowans and agreed not to compete with them. The Rowans filed a complaint with the PSC alleging that he transported mobile homes without proper PSC authority. *Id.* at 764.

McKnight filed an affidavit that he hadn't transported mobile homes and a PSC investigator agreed. *Id.* at 764, 764 n. 1, 765 n.3.

The Rowans sued in circuit court, asserting that McKnight violated the agreement by transporting mobile homes. *Id.* at 764.

This Court reversed the trial court's ruling that the PSC finding was res judicata, and decided

that although a PSC investigator determined that McKnight wasn't transporting mobile homes illegally, the PSC didn't make a determination regarding the breach of contract claim. *Id.* at 765.

Similarly, the PSC did not adjudicate whether or not Waste Management breached its Agreement, especially in consideration of its bad faith conduct. *See Blethen v. Dept. of Revenue/State*, Syl. Pt. 2, 219 W. Va. 402, 633 S.E.2d 531(2006)(per curiam) - "The doctrine of res judicata does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants."

Finally, unlike the 2005 Order approving the transfer of Jochums' certificates to Waste Management, the 2006 Order was not based on an evidentiary hearing.

**II. THE COURT SHOULD REVERSE THE TRIAL COURT'S SUMMARY JUDGMENT RULING REGARDING PROVISION § 9(D) BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER OR NOT IT WAS SATISFIED OR VIOLATED**

The trial court ruled that "When the *Harper* ruling was decided on April 11, 2006, the issue of whether the Certificates transfer would gain governmental approval was still undecided, thus failing to satisfy the condition set forth in Section 9(d) of the Agreement."

Section 9(d) reads:

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

(d) 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 Public Service Commission approved the transfer of the Jochums' certificates to Waste Management in a December, 2005 order. See Exhibit 3 to the Jochums' Appellate Brief. And in June, 2006, this Court refused ADS's petition for appeal of the order.

Waste Management argues that § 9(d) was not satisfied in December, 2005 due to ADS' petition for appeal and that 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.

But Waste Management's actions speak louder than its words: although Waste Management now argues that the December, 2005 order was not final prior to *Harper*, it applied for a rate increase under the Jochums' certificates after ADS petitioned to appeal the December decision, but before this Court denied the petition. See EXHIBITS F & G, at ¶¶ 6-8, respectively. The December, 2005 Order was sufficient for purposes of the Agreement because Waste Management didn't wait until it was final before applying for the rate increase.

Further, Waste Management again contradicts its prior assertions. During the time that ADS's petition for appeal was pending, Waste Management represented to the PSC that it hadn't proceeded with the transfer because it was awaiting the rate increase:<sup>6</sup>

Waste Management has not commenced operations in the subject territory as it has been awaiting the Commission's approval for a rate increase. Jochum has continued to provide solid waste collection and transportation services to its customers in Marshall and Ohio Counties, pending the approval of a rate increase to Waste Management. As such, the transfer of authority between the two motor carriers has not yet occurred.

EXHIBITS F & G, at ¶ 9, respectively.

Waste Management does not mention that the December, 2005 order was not final or insufficient for purposes of § 9(d) and complying with the Agreement.

Therefore, Waste Management's **own actions and representations** create a genuine issue

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The Jochums assert that Waste Management didn't proceed with the transfer because it anticipated *Harper* and didn't want to fulfill its obligations under the Agreement, not because it was waiting on the rate increase.

of material fact whether or not § 9(d) is satisfied and/or violated.

Finally, per a recent telephone call to the PSC, the Jochums' counsel has confirmed that *Harper* didn't eradicate PSC certificates - Waste Management wrongfully misrepresents that the Jochums "cannot lawfully transfer their Certificates to Waste Management."

### **III. SUMMARY AND CONCLUSION**

In summary, the circuit court's dismissal of the Jochums' case on summary judgment grounds should be reversed because genuine issues of material facts exist concerning §§ 9(e) and (d).

As to § 9(e), Waste Management intentionally chose to use the ambiguous terms "less economic" 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; and its bad faith conduct violated the covenant of good faith and fair dealing which required Waste Management to comply with the Agreement. Additionally, *Harper* did not make the Agreement less profitable. Finally, collateral estoppel and/or res judicata do not apply.

As to § 9(d), Waste Management has effectually admitted through its prior actions and representations that the December, 2005 order satisfied § 9(d); and, even if it didn't, the Jochums had a reasonable time to comply before closing.

WHEREFORE, Jacob Frederick Jochum, Jacob F. Jochum, Jr., d/b/a Jacob Jochum Truck Service, pray that the October 1, 2007 Order and January 4, 2008 substitute Order be reversed and remanded.

Respectfully submitted,

Jacob Frederick Jochum, Jacob F. Jochum, Jr., d/b/a Jacob  
Jochum Truck Service,  
Appellants

  
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**CERTIFICATE OF SERVICE**

I, the undersigned counsel, caused the foregoing **REPLY BRIEF OF JACOB  
FREDERICK JOCHUM, and JACOB F. JOCHUM, JR., d/b/a JACK JOCHUM TRUCK  
SERVICE TO BRIEF OF APPELLEE, WASTE MANAGEMENT OF WEST VIRGINIA** to  
be served on the defendants on this 16<sup>th</sup> day of December, 2008, at the law offices of their  
attorneys, as follows:

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Short Creek Landfill, and Allied Waste Services of Wheeling, Allied Waste Services of North  
America, LLC, and Jeff Brown*

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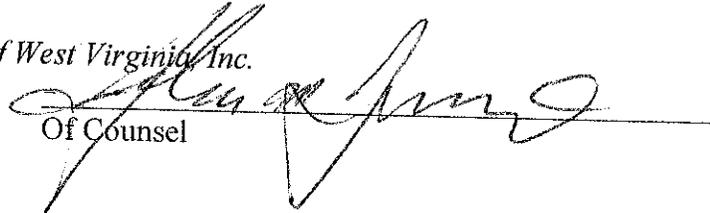
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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**