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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

M & J GARAGE AND TOWING, INC.,
a West Virginia Corporation,
PLAINTIFF BELOW/APPELLANT,

VS.

PETITION NUMBER: 091432
(KANAWHA COUNTY CASE NUMBER: 09-C-12)

THE WEST VIRGINIA STATE POLICE,
DEFENDANT BELOW/APPELLEE.

BRIEF OF APPELLANT

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OF WEST VIRGINIA

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I. NATURE OF PROCEEDING AND RULING BELOW

This matter comes before the West Virginia Supreme Court of Appeals from the Circuit Court of Kanawha County, West Virginia, the Honorable Tod J. Kaufman, presiding, upon the May 12, 2009, Order granting Defendant's Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment, Petition for Injunctive Relief, and Complaint for Damages, Costs and Attorney's Fees.

The Plaintiff below filed an action in the Circuit Court of Kanawha County, West Virginia, pursuant to Chapter 14, Article 2, Section 2, of the West Virginia Code, and pursuant to the Uniform Declaratory Judgment Act of the State of West Virginia, Chapter 55, Article 13, Section 1, et seq., of the West Virginia Code, therein requesting the Circuit Court of Kanawha County, West Virginia, to find and declare that the West Virginia State Police, an agency of the State of West Virginia, exceeded its statutory power in the regulation and penalizing of the wrecker service of the Plaintiff in violation of statutory authority under Chapter 24A, of the West Virginia Code, and in violation of Article III, Sections 3 and 10 of the Constitution of the State of West Virginia; and wherein the Plaintiff requested injunctive relief to prohibit the Defendant, the West Virginia State Police, from continuing to exceed their statutory authority in violation of the rights of the Plaintiff wrecker service, and to cease and desist interference with statutorily mandated county emergency 911 dispatch of Plaintiff's wreckers in violation of Chapter 24A, Article 2, Section 1, et seq., and Chapter 24, Article 6, Section 12, of the West Virginia Code; and further to require the West Virginia State Police to comply with requests made on behalf of the Plaintiff pursuant to Chapter 29B, Article 1, Section 1, et seq., entitled the Freedom of Information Act. The matter was noticed by Plaintiff for hearing for purposes of discovery

matters, a briefing schedule and temporary injunctive relief, and came before the Court on the 1st day of April, 2009. A Motion to Dismiss filed on behalf of the Defendant on March 30, 2009, claimed that the Defendant had rescinded its policy of a "wrecker rotation list" following the filing of Plaintiff's Complaint, and therefore, there was no longer a need for judicial review of the matter since the subject policy had no operational effect, and upon a lack of subject matter jurisdiction pursuant to Chapter 55, Article 17, Section 3(a)(1). The Court heard arguments of counsel on April 1, 2009, and took the matter under advisement for consideration of Defendant's Motion to Dismiss which was filed by Certificate dated March 30, 2009. The Court granted a briefing schedule upon the Defendant's Motion to Dismiss, and upon briefs being filed by counsel for the respective parties, the Court entered an Order granting Defendant's Motion to Dismiss on May 12, 2009, which included findings of fact and conclusions of law that there was no statutory prohibition to the West Virginia State Police creating or using a rotational "wrecker list", and finding that the Plaintiff has no statutory right as wrecker service to be called by the West Virginia State Police in utilizing wrecker services in the State of West Virginia.

The Plaintiff brings this Appeal before the West Virginia Supreme Court of Appeals for *de novo* review of the judgment of the Circuit Court of Kanawha County, West Virginia, to find that the Order entered by the Circuit Court of Kanawha County, West Virginia, is in error and exceeds the scope of the Motion to Dismiss filed on behalf of the Defendant, to find that the actions of the West Virginia State Police exceed its agency statutory authority and the constitutional protections of your Plaintiff, and to enter such further Order as grants relief to the Plaintiff from the unlawful actions of the Defendant.

II. STATEMENT OF FACTS

M & J Garage and Towing, Inc., is a West Virginia Corporation, organized pursuant to the laws of the State of West Virginia as a common carrier principally engaged in the business of towing, hauling or carrying wrecked or disabled vehicles in the State of West Virginia, for hire, with its principal place of business located along U.S. Highway 33 East in Weston, Lewis County, West Virginia. M & J Garage and Towing owns a full range of wreckers and trucks to operate towing services from the smallest private tow to the largest multi-wrecker tractor and trailer accident on Interstate 79. M & J Garage and Towing and its principal owners depend upon the towing and wrecker service business as a livelihood. "M & J" (Garage and Towing) is an abbreviation for "Matt and Judy" Brown, residents of Weston, West Virginia, who own and operate a garage and towing business in Weston, Lewis County, and surrounding counties.

The West Virginia State Police is a political subdivision in the State of West Virginia, as a part of the Division of Public Safety, an agency of the State of West Virginia, with its principal office and headquarters at 725 Jefferson Road, South Charleston, West Virginia. The dispute in the underlying action arose through the barracks commander of the Elkins Detachment of the West Virginia State Police. As the dispute continued, the Charleston headquarters of the West Virginia State Police and their in-house counsel, an assistant attorney general, became involved.

During the latter part of 2007, and through 2008, the Plaintiff below noticed a significant decrease in dispatch for towing and wrecker services from investigations of the West Virginia State Police. During the summer of 2008, the Plaintiff made informal inquiry regarding the decrease in dispatch for wrecker services for the State Police. On August

5, 2008, Matt Brown, the principal owner of M & J Garage, Inc., received a telephone call from a Lieutenant Malcomb of the Elkins Detachment of the West Virginia State Police. Lieutenant Malcomb identified himself as the person in charge of the West Virginia State Police "wrecker list". He stated to Matt Brown that he had received numerous complaints about M & J Garage and Towing amounting to a "practice" of overcharging or excessive billing and that he would need a copy of M & J Garage towing rates. Matt Brown said to Lieutenant Malcomb that he was unaware that the West Virginia State Police were in charge of wrecker pricing. The intercourse between M & J Garage, Matt Brown, Lieutenant Malcomb and the West Virginia State Police is described within the attachments to Plaintiff's Exhibits 4 and 5, all of which is attached to Plaintiff's original Complaint filed with the Circuit Court below. Following the initial discussion of Matt Brown with Lieutenant Malcomb, M & J Garage and Towing received a letter dated October 28, 2008, from Captain M. J. Trupo, commander of the Elkins Detachment of the West Virginia State Police, therein advising M & J Garage and Towing that their wrecker service was being removed from the State Police wrecker rotation list. The letter dated October 28, 2008, is attached to Plaintiff's original Complaint below as Plaintiff's Exhibit 1. Thereafter, counsel became involved on behalf of M & J Garage and Towing, Inc.; letters were written back and forth between counsel and the West Virginia State Police; and ultimately an assistant attorney general became involved on behalf of the West Virginia State Police. This information is all more fully set forth within the Complaint for Declaratory Judgment and the Exhibits attached thereto filed in the Circuit Court of Kanawha County, West Virginia, in Civil Action No. 09-C-12, below.

Two separate requests were made on behalf of the Plaintiff to the West Virginia State Police pursuant to the Freedom of Information Act, 29B-1-1, et seq., to obtain the basis of the claimed authority of the West Virginia State Police to maintain a "wrecker rotation list"; to obtain copies of any documented complaints or other information in the possession of the West Virginia State Police demonstrating any complaints of overcharging on the part of the Plaintiff below, and to obtain documentation from the West Virginia State Police of the actual use and operation of the "West Virginia State Police wrecker rotation list" in Lewis County and surrounding counties in which the Plaintiff operates a wrecker service. Prior to the FOIA request from counsel, the West Virginia State Police had refused to provide any documentation or information whatsoever to the Plaintiff. When the information was provided to counsel for Plaintiff by the West Virginia State Police, the information as to the documented rotation list was clearly incomplete. These matters were discussed at length between counsel for the Plaintiff and with the headquarters of the West Virginia State Police in Charleston, Captain Ingold, and their counsel, assistant attorney general Virginia Grottendieck Lanham through December of 2008. See attachments to Plaintiff's Complaint below. Clearly, documentation is not and has not been kept or maintained by the West Virginia State Police as required by statute for 911 dispatch and rotation, there again violating the "public interest" of preserving wrecker/towing services as common carriers in West Virginia. If the records do exist, the State Police simply refused to provide them.

The primary effort of the Plaintiff with the West Virginia State Police giving rise to the underlying action in the Circuit Court of Kanawha County, West Virginia, was to have the West Virginia State Police rescind their letter of October 28, 2008, and to cease and

desist "blackballing" M & J Garage and Towing from the wrecker service dispatch of the West Virginia State Police. The West Virginia State Police went so far as to turn M & J Garage and Towing trucks away from dispatch of several calls made through the county emergency telephone 911 system in Lewis County, West Virginia. The Lewis-Gilmer County emergency 911 center received a call from Sergeant Joe Menendez of the West Virginia State Police requesting that the M & J Garage and Towing service be removed from the wrecker rotation list of Lewis-Gilmer county 911. See Plaintiff's Exhibit 6 attached to the Plaintiff's Complaint filed below.

In spite of numerous requests, both by letter and telephone, the West Virginia State Police refused to reinstate M & J Garage and Towing, Inc., in their rotational dispatch, and they refused to discontinue interference with the business operation of M & J Garage and Towing, Inc., in responding to 911 emergency calls through county dispatch. The new captain of the state Police in Elkins, Captain Dawson, informed counsel for Appellant that he would consider reinstatement of M & J Garage on the State Police wrecker list if M & J Garage would produce two years of billing records, 2007 and 2008, and allow the State Police to review all billings and invoices to ascertain whether or not M & J Garage had overbilled customers. Matt Brown refused this intrusion by the State Police. The State Police maintain this refusal to allow inspection of documents of M & J as "non-compliance", and cited same as justification to continue to "ban" M & J from further dispatch for towing services at traffic situations investigated by the West Virginia State Police.

On January 5, 2009, a Complaint for Declaratory Judgment, Petition for Injunctive Relief and Complaint for Damages, Costs and Attorney's fees was filed in the Circuit Court of Kanawha County, West Virginia, by the Plaintiff, M & J Garage and Towing, Inc., against

the West Virginia State Police pursuant to Chapter 14, Article 2, Section 2, of the West Virginia Code, which requires venue of this action in the Circuit Court of Kanawha County, West Virginia, and pursuant to Chapter 55, Article 13, Section 1, et seq., the Uniform Declaratory Judgments Act. On February 6, 2009, the Defendant, the West Virginia State Police, filed their Answer, wherein the Defendant admits that the West Virginia State Police maintained and continued at that time to maintain their own "rotation lists" or service lists of wrecker services for dispatch by members of the West Virginia State Police. Answer at Paragraph 13. Plaintiff scheduled a hearing to take place on April 1, 2009, for consideration of discovery, a briefing schedule, and injunctive relief. On March 30, 2009, the Defendant filed a Motion to Dismiss Plaintiff's Complaint upon representations that the West Virginia State Police rescinded its Operational Policy and Procedure No. 23-2 which provided for the West Virginia State Police wrecker "rotation list". The Defendant therein represented that there was "no longer a need for judicial review of this matter since the subject policy has no operational effect and therefore dismissal is warranted". The Defendant further claimed a lack of subject matter jurisdiction with the Circuit Court of Kanawha County, West Virginia, pursuant to Chapter 55, Article 17, Section 3(a)(1), upon the Defendant's claims that the Plaintiff was required to provide a statutory 30 day notice of intent to file suit. At the hearing of April 1, 2009, there was no testimony or evidence taken. At the hearing of April 1, 2009, the Court heard argument of counsel, and the Court made certain statements, on the record, which may be considered "findings", however, the Circuit Court refused to enter an Order for the hearing of April 1, 2009, upon the relief requested by Plaintiff. The Circuit Court directed a briefing schedule, and upon conclusion of the filing of briefs on behalf of each party, the Court entered an Order granting the

Defendant's Motion to Dismiss dated May 12, 2009, in the form of an Order granting summary judgment and directing judgment for the West Virginia State Police.

Within the Order of the Circuit Court of Kanawha County, West Virginia, Judge Kaufman made certain Findings of Fact and Conclusions of Law all of which appear to be based upon factual representations contained within the pleadings and the arguments of counsel, and in the interpretation of statutory law presented to the Court within pleadings and the parties' respective briefs. Specifically, the Circuit Court not only found that there is "no statutory prohibition to the West Virginia State Police creating or using a 'wrecker list'" but the Court also found that the West Virginia State Police had not violated any statute or rule by using a "wrecker list" or not using a "wrecker list". Order of Dismissal, Conclusion 1 and 2. The Court further found that the Plaintiff, M & J Garage and Towing, Inc., has no statutory right to be called by the West Virginia State Police to perform wrecker services. Id., at Conclusion No. 3. Based upon these conclusions, the Court dismissed Plaintiff's Complaint and entered judgment finding in favor of the West Virginia State Police.

III. ASSIGNMENTS OF ERROR

Petitioner would assign the following error to the actions of the Circuit Court:

1. The Court erred in the dismissal of the Complaint below and in finding in favor of the West Virginia State Police in the form of granting summary judgment.

2. The statutory mission of the West Virginia State Police, and the statutory limitations of the West Virginia State Police do not allow the West Virginia State Police to implement, maintain or regulate a wrecker rotation list for the dispatch of wreckers. The

ruling of the Circuit Court is not only wrong, but allows the West Virginia State Police to violate the constitutional rights of the Plaintiff as stated in Article III, Sections 3 and 10.

3. The Circuit Court erred in failing to find and acknowledge that the Plaintiff is affected by a "public interest" and statutory protections as a public utility and common carrier pursuant to Chapter 24A, Article 2, Section 1, of the West Virginia Code, and for regulation by the Public Service Commission pursuant to Chapter 24A, Article 2, Section 1, et seq. The Defendant below, the West Virginia State Police does not have unbridled authority, and has only those statutory powers as specifically granted by the legislature of the State of West Virginia. By the implementation of Policy 23-2, and by maintaining an autonomous wrecker rotation list, without the due process protections delegated by the legislature to the West Virginia Public Service Commission, the West Virginia State Police has exceeded its statutorily delegated authority, and therefore, upon judicial review by the Circuit Court of Kanawha County, West Virginia, the Circuit Court was mandated to reverse and vacate the actions of the West Virginia State Police as they affect the Plaintiff below as a common carrier wrecker service in the State of West Virginia.

4. The Circuit Court failed to consider the Freedom of Information requests made by the Plaintiff below to the Defendant, and the Defendant's failure to fully respond, and including reimbursement of attorney's fees to the Plaintiff.

IV. POINTS AND AUTHORITIES

Affiliated Const. Trades Foundation vs. Public Service Commission of West Virginia, 211 W. Va. 315, 565 S.E. 2d (2002)

Boggs vs. Public Service Commission, 154 W. Va. 146, 174 S. E. 2d 331 (1970)

Easterling vs. American Optical Corp., 207 W. Va. 123, 529 S.E. 2d 588 (2000)

Elmore vs. Triad Hospitals, Inc., 220 W. Va. 154, 640 S.E. 2d 217 (2006)

Forshey vs. Jackson, 222 W. Va. 743, 671 S.E. 2d 748 (2008)

Huffman vs. Criner, 218 W. Va. 197, 624 S.E. 2d 544 (2005)

Kessel vs. Monongalia County General Hospital Co., 220 W. Va. 602, 648 S.E. 2d 366 (2007)

McDaniel vs. West Virginia Division of Labor, 214 W. Va. 719, 591 S.E. 2d 277 (2003)

Rhododendron Furniture & Design, Inc. vs. Marshall, 214 W. Va. 463, 590 S.E. 2d 656 (2003)

State ex rel Mountaineer Park vs. Polan, 190 W. Va. 276, 438 S.E. 2d 308 (1993)

West Virginia-Citizen Action Group vs. Public Service Commission, 175 W. Va. 39, 330 S.E. 2d 849 (1985), Syl. Pt. 1

West Virginia Health Care Cost Review Authority vs. Boone, 196 W. Va. 326, 472 S.E. 2d 411 (1996)

Zaleski vs. West Virginia Physicians Mutual Insurance Co., 220 W. Va. 311, 647 S.E. 2d 747 (2007)

WV Code 14-2-2

WV Code15-2-12

WV Code15-2-13

WV Code 24-6-12

WV Code 24A-2-1

WV Code 24A-2-2a

WV Code 55-13-1, et seq.

WV Code 55-17-3(a)(1)

WV Rules of Civil Procedure 12(b)(1)

V. ARGUMENT OF LAW

1. STANDARD OF REVIEW

Appellate review of the Order of the Circuit Court granting Defendant's Motion to Dismiss dated May 12, 2009, is *de novo*, both, upon the Defendant's Motion to Dismiss, and upon a Motion for Summary Judgment in the event that the Appellate Court finds that the Circuit Court treated Defendant's Motion to Dismiss as a Motion for Summary Judgment. Forshey vs. Jackson, 222 W. Va. 743, 671 S.E. 2d 748 (2008); Zaleski vs. West Virginia Physicians Mutual Insurance Co., 220 W. Va. 311, 647 S.E. 2d 747 (2007); Huffman vs. Criner, 218 W. Va. 197, 624 S.E. 2d 544 (2005); Rhododendron Furniture & Design, Inc. vs. Marshall, 214 W. Va. 463, 590 S.E. 2d 656 (2003).

A motion to dismiss for lack of personal jurisdiction or subject matter jurisdiction cannot be converted to a motion for summary judgment, even though a trial court considers matters outside the pleadings in deciding the motion. Easterling vs. American Optical Corp., 207 W. Va. 123, 529 S.E. 2d 588 (2000); Elmore vs. Triad Hospitals, Inc., 220 W. Va. 154, 640 S.E. 2d 217 (2006). The Motion to Dismiss of the Defendant was served upon the Plaintiff on March 30, 2009, by fax, two days before the hearing scheduled for April 1, 2009. Within the Motion to Dismiss, the Defendant alleged that the "wrecker rotation list" which had been maintained by the West Virginia State Police had been rescinded by the headquarters of the West Virginia State Police effective March 9, 2009. The Defendant further represented to the Court that there was no longer a need for judicial review of the Plaintiff's Complaint since the subject policy had no further operational effect on the Plaintiff. The Defendant also claimed within its Motion to Dismiss that Plaintiff's

claims for damages against the Defendant must be dismissed for failure to provide a statutory 30 day notice of intent to file suit as required by West Virginia Code 55-17-3(a)(1). Based thereon, the Defendant claimed a lack of subject matter jurisdiction for the Court pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure. By the Order of the Court dated May 12, 2009, the Court's ruling went far beyond the Motion to Dismiss of the Defendant, and the Order granting Defendant's Motion to Dismiss clearly granted summary judgment in favor of the Defendant rather than a motion to dismiss. The conclusions made by the Court within its Order of May 12, 2009, are clear error. Not only is the Court wrong in its interpretation of statutory authority of the West Virginia State Police, but the Court failed to consider both, the statutory regulation of the West Virginia State Police and the Public Service Commission as well as the constitutional protections of the Plaintiff.

2. VENUE AND JURISDICTION OF SUIT

The underlying action came before the Circuit Court of Kanawha County, West Virginia, pursuant to Chapter 14, Article 2, Section 2, of the West Virginia Code, which requires any suit brought against a State agency as a party defendant to be brought and prosecuted only in the Circuit Court of Kanawha County, West Virginia. Chapter 55, Article 13, Section 1, et seq., allows courts of record in the State of West Virginia the power and jurisdiction to declare rights, status and other legal relations, including statutory authority between private individuals, corporations and State agencies in the State of West Virginia. Chapter 55, Article 17, Section 3(a)(1) does require a notice of at least 30 days prior to the institution of an action against a government agency by providing the chief officer of the governmental agency and the attorney general written notice, by certified mail, return

receipt requested, of the alleged claim and relief desired, however, those provisions do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of 55-17-3(a)(1). In fact, the Circuit Court of Kanawha County, West Virginia, did not grant the Motion to Dismiss of the Defendant as set forth within the Motion. The Circuit Court below actually entered an Order making findings of fact and conclusions of law, interpreting statutes, as if upon a motion for summary judgment rather than upon the Motion to Dismiss as drafted by the Defendant. Based thereon, it would appear that the Circuit Court of Kanawha County, West Virginia, has violated the requirements of both, Elmore, supra, and Easterling, supra.

3. VIOLATIONS OF STATUTORY AND CONSTITUTIONAL AUTHORITY BY THE WEST VIRGINIA STATE POLICE

The statutory "mission of the State Police" is found in Chapter 15, Article 2, Section 12, of the West Virginia Code at Subsection (a) to state as follows:

> (a) The West Virginia State Police shall have the mission of state wide enforcement of criminal and traffic laws with emphasis on providing basic enforcement and citizen protection from criminal depredation throughout the state and maintaining the safety of the state's public streets, roads and highways. 15-2-12(a)

Chapter 15, Article 2, Section 13, of the West Virginia Code establishes statutory limitations upon members of the West Virginia State Police as same apply to this Petition and the underlying action at Subparagraph (a) stated as follows:

(a) No member of the West Virginia State Police may in any way interfere with the rights or property of any person except for the prevention of crime. 15-2-13(a)

Upon the foregoing, the Circuit Court of Kanawha County, West Virginia, is clearly wrong in its conclusion of law that there is "no statutory prohibition to the West Virginia State Police creating or using a 'wrecker list'". In fact, the dispatch of towing services for emergency towing of vehicles is established by statutory authority at Chapter 24, Article 6,Section 12, of the West Virginia Code. The County Commission of each county, or the municipality operating an emergency telephone system or enhanced emergency telephone system, such as 911, is responsible for the establishment of a policy that provides for the most prompt, fair, equitable and effective response to requests or dispatches for emergency towing services. 24-6-12. The only caveat in 24-6-12(a) is that the county will act in consultation with all public safety units and public agencies in the establishment of the stated policy. There is nothing whatsoever within 24-6-12(a) or any other statutory authority which allows the West Virginia Department of Public Safety or the West Virginia State Police to implement, maintain or regulate any dispatch for emergency towing services. Based upon 24-6-12, Conclusion of Law No. 2 found by the Circuit Court of Kanawha County, West Virginia, is also clearly wrong. The Circuit Court found as follows at Paragraph 2 of the Conclusions of Law:

2. Defendant has not violated any statute or rule either by using a "wrecker list" or not using a "wrecker list". On the contrary, West Virginia Code Section 24-6-12 specifically authorizes the Defendant to work with the

County Commission to formulate an arrangement for the dispatching of emergency vehicles such as the "wrecker list" Defendants maintained.

24-6-12 provides no such authority to the West Virginia State Police. The authority is delegated to the County Commission of each county in the State of West Virginia. There is no statutory authority to allow the West Virginia State Police to implement, maintain or regulate a "wrecker list".

Within the Findings of Fact by the Circuit Court in the Order of May 12, 2009, commencing at Paragraph 11, the Circuit Court found that the Defendant, the West Virginia State Police, had rescinded its policy of an established wrecker list in early March of 2009, and that notice of the recision was distributed. In fact, there was no distribution of notice to the Plaintiff. While the headquarters of the West Virginia State Police in Charleston, West Virginia, may have noticed its barracks commanders that Policy No. 23-2 had been rescinded, there was no notice to any barracks commanders lifting the prohibition against dispatch of the Plaintiff to provide wrecker service for investigations of the West Virginia State Police. Interestingly, at Page 58 of the transcript of the hearing of April 1, 2009, the Court and counsel for the Defendant had the following interchange:

> THE COURT: He's not singled out. That he is back on neutral ground. I mean, you all probably would say that he has been back to neutral ground for a long time.
>
> MRS. LANHAM: Yes.

In fact, immediately following the hearing, the Plaintiff inquired around the state as to whether or not Policy 23-2 had been rescinded, and whether or not the Plaintiff was, in fact, back on "neutral ground". Plaintiff was informed in no uncertain terms by the West

Virginia State Police that there had been no recision of the disqualification of the Plaintiff in the dispatch of wrecker services by the West Virginia State Police. Sergeant Joe Menendez of the West Virginia State Police at Weston, and Captain Dawson of the West Virginia State Police at Elkins informed Matt Brown of M & J Garage, that his business continued to be "banned", and that the West Virginia State Police continued to autonomously dispatch wrecker services as they had in the past. The only change was they no longer maintained any form of a list. See Petition for Contempt verified by the Plaintiff and filed by Certificate dated April 13, 2009. As of the filing of this brief, M & J Garage continues to be "banned" from dispatch by members of the West Virginia State Police, and the State Police no longer make any pretense of complying with the requirements imposed by the legislature upon either the 911 Center and County Commission or the Public Service Commission in dispatch and regulation of towing services.

Interestingly, the Circuit Court seemed to understand the position of the Plaintiff at Pages 27 through 30 of the transcript of the hearing of April 1, 2009. The Circuit Court further seemed to understand the due process concerns of the Plaintiff from the bottom of Page 43 of the hearing transcript of April 1, 2009, to the bottom of Page 45, and from Page 47 through Page 48 of the hearing transcript. Despite these glimmers of what appeared to be understanding on the part of the Circuit Court, the Circuit Court went on to find in the Findings of Fact of the Order of May 12, 2009, as follows:

12. Defendant must have the ability to obtain the services of towing companies or wreckers under numerous circumstances.

13. Defendant appears to have tried to institute a fair and equitable policy for using wrecker services.

14. In this case, Defendant's decision not to call Plaintiff for wrecker services has not prohibited Plaintiff from doing business with private individuals, private businesses, or other agencies.

16. There is no absolute entitlement for Plaintiff to provide services to the West Virginia State Police.

The Findings of Fact stated by the Court from Paragraph 12 through Paragraph 16 of the Court's Order are clearly wrong, and violate West Virginia statutory law, as well as the constitutional protections of the Plaintiff in property rights and the pursuit of business. The legislature may not grant to an administrative agency unbridled authority under an enabling statute, and the delegation of authority must be circumscribed by rules for guidance of the agency. State ex rel Mountaineer Park vs. Polan, 190 W. Va. 276, 438 S.E. 2d 308 (1993). Administrative agencies and their executive officers are creatures of statute and delegates of the legislature, and their power is dependent upon statutes, so that they must find within the statute a warrant for the exercise of any authority which they claim; they have no general or common-law powers, but only such as have been conferred upon them by law expressly or by implication. McDaniel vs. West Virginia Division of Labor, 214 W. Va. 719, 591 S.E. 2d 277 (2003). Premised thereon, the West Virginia Department of Public Safety and the West Virginia State Police are creatures of statutory enactment. It is fundamental law that the legislature may delegate to an administrative agency power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent

with, or which alters or exceeds its statutory authority. Kessel vs. Monongalia County General Hospital Co., 220 W. Va. 602, 648 S.E. 2d 366 (2007). McDaniel, supra, has held that pursuant to the West Virginia Administrative Procedures Act, a reviewing Circuit Court may affirm the Order or decision of the agency or remand the case for further proceedings. The Circuit Court shall reverse, vacate or modify the Order or decision of the agency if the substantial rights of the Petitioner or Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or Order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error or law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. McDaniel, supra; West Virginia Health Care Cost Review Authority vs. Boone, 196 W. Va. 326, 472 S.E. 2d 411 (1996).

By the policy designated by the West Virginia State Police as 23-2, revised on November 15, 2006, the West Virginia State Police has implemented and maintained a "State Police wrecker list" from which the West Virginia State Police have obtained services of wreckers in West Virginia State Police investigations as demonstrated within the attachment to the letter of the West Virginia State Police dated November 20, 2008, attached to Plaintiff's Complaint below as Plaintiff's Exhibit 4. Policy 23-2 of the West

Virginia State Police violates Chapter 24A, Article 2, Section 1, et seq., of the West Virginia Code. Within 24A-2-1, the West Virginia legislature declares as follows:

> All common carriers by motor vehicle are hereby declared to be affected with a public interest and subject to the laws of this state now in force or that hereafter may be enacted pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

Although Chapter 24A, Article 2, Section 2a, of the West Virginia Code may have been found unconstitutional because the purpose and effect were not adequately set forth in the title of Chapter 98, Acts of the Legislature, the legislature has clearly spoken that motor vehicles engaged in the business of towing, hauling or carrying wrecked or disabled vehicles shall, notwithstanding any provision of the laws of the State of West Virginia to the contrary, be regulated by the provisions of 24A-2-2a. The legislature gave full control of wrecker services to the Public Service Commission. The Public Service Commission was directed to implement regulatory powers to protect the due process of each wrecker service as a common carrier in the State of West Virginia, as was acknowledged by the Defendant. Transcript @ p. 29. Hearing procedures were implemented for operation by the Public Service Commission in the event of any violation of the rules and regulations of the Public Service Commission. No such policy or procedure was implemented by the West Virginia Department of Public Safety or the West Virginia State Police. Therefore, Policy 23-2, and the implementation by the West Virginia State Police of an autonomous wrecker list was without statutory authority, and it also violates the due process provisions of the West Virginia Constitution. The policies enacted by county 911 centers pursuant to Chapter 24, Article 6, Section 12, include a rotation list which is designed as a fair and

equitable process for each tow service as statutorily prescribed. In addition, the 911 centers are required to maintain a public record of each towing service utilized for each incident where towing services are required. 24-6-12(a) and (b). At this point, by the admission of the State Police, they no longer maintain any form of a "wrecker list", they keep little or no records, and they have no due process safeguards at all. The West Virginia State Police simply call any wrecker service which they independently desire, with no mandated record keeping, and without any oversight by any regulatory or statutory authority. While this is really "business as usual" for the West Virginia State Police, at least prior to the rescinding of 23-2, the West Virginia State Police arguably made some minute effort at making a show of complying with the requirements previously placed upon the Public Service Commission and upon emergency 911 centers. Now, the West Virginia State Police make no effort whatsoever at fairness, due process, or any other equitable conduct for the benefit of common carrier wrecker services which have, by the legislature, been declared to be affected with a "public interest". 24A-2-1. The Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public. Boggs vs. Public Service Commission, 154 W. Va. 146, 174 S. E. 2d 331 (1970); West Virginia-Citizen Action Group vs. Public Service Commission, 175 W. Va. 39, 330 S.E. 2d 849 (1985), Syl. Pt. 1; Affiliated Const. Trades Foundation vs. Public Service Commission of West Virginia, 211 W. Va. 315, 565 S.E. 2d (2002). The West Virginia State Police were created to serve an entirely different purpose, to investigate criminal conduct. 15-2-12(a).

The Plaintiff has alleged within its Complaint, and maintains the position, that the West Virginia State Police have manufactured the "complaint" generated against M & J Garage by Lieutenant Malcomb after Matt Brown, the owner of M & J Garage and Towing, Inc., made inquiry as to why he was not being called by the West Virginia State Police for towing services in Lewis County, Harrison County, Randolph County and Braxton County. The "report" of Lieutenant Malcomb which is attached to Plaintiff's Complaint as a portion of Plaintiff's Exhibit 4, is completely without documentation as to any complaint made as to overbilling by M& J Garage. In fact, prior to the Plaintiff below obtaining counsel, the West Virginia State Police refused to provide any information as to the basis of any complaint or complaints made against Matt Brown or M & J Garage and Towing. Further, even if the complaint were actually made by Mr. Loftus, there is no demonstration that the bill for services by M & J Garage and Towing was in any way excessive. The State Police gave no opportunity to the Plaintiff below to explain the alleged overcharge prior to obtaining counsel and making a formal FOIA request. It was also only then demonstrated that there was no "practice of overcharging" as alleged by Lieutenant Malcomb, but only one unsubstantiated complaint to the West Virginia State Police which has never been communicated to the Public Service Commission to be acted upon either from the original "complainant" or from the West Virginia State Police.

By the ruling of the Court of May 12, 2009, the Circuit Court of Kanawha County, West Virginia, has essentially affirmed the permanent expulsion of the Plaintiff from wrecker services for any investigation performed by the West Virginia State Police, forever, and without regard to any due process or constitutional protection of the Plaintiff. The Court further denied any opportunity for the Plaintiff to prove his case in court and to make

an effort to obtain damages from the West Virginia State Police for their unlawful actions against the Plaintiff.

The actions of the West Virginia State Police in Lewis County against M & J Garage and through Captain Trupo and the West Virginia State Police in Elkins and Charleston are not isolated or singular. There are similar complaints throughout West Virginia. Particularly, your Appellant knows of similar complaints of abuse of towing services' rights in Monongalia County, Berkeley County, Hardy County, and Pendleton County, all of which have 911 enhanced emergency phone services and in all of which the West Virginia State Police dispatch wrecker services without the 911 system.

VI. CONCLUSION

WHEREFORE, your Petitioner respectfully moves and petitions this Honorable Court to enter an Order granting relief from the Order of the Circuit Court below as follows:

1. That the Order of the Circuit Court of Kanawha County, West Virginia, entered May 12, 2009, be vacated.

2. That this Honorable Court find, conclude and order that the West Virginia State Police and the West Virginia Department of Public Safety are without the statutory or constitutional authority to implement, maintain, investigate or regulate any dispatch of common carrier wrecker services in the State of West Virginia.

3. That the Court find, conclude and order that the Public Service Commission of the State of West Virginia is vested with the exclusive statutory authority and jurisdiction in the State of West Virginia to implement, regulate, investigate and hold hearings to enforce any Order or penalties for violations of common carrier wrecker services in West Virginia.

4. That the Court find, conclude and order that wrecker services in the State of West Virginia are affected by "public interest" which gives rise to constitutional due process and property protections under the Constitution of the State of West Virginia.

5. That the Court find, conclude and order that the West Virginia State Police is limited by the enabling language of statutory authority from the legislature as set forth within Chapter 15, Article 2, Sections 12 and 13.

6. That the Court enter an Order prohibiting the West Virginia State Police from further dispatch, investigation, regulation or enforcement of any common carrier in West Virginia, including towing or wrecker services, and that the West Virginia State Police be prohibited from any interference with private business in the State of West Virginia not specifically allowed by statute that is solely for enforcement of criminal laws and criminal investigation or traffic safety.

7. That the Court find, conclude and order that the County Commissions of each county and enhanced emergency telephone systems, 911, are solely authorized by statute to dispatch towing and wrecker services in all counties which have same available.

8. That the Court find, conclude and order that the Circuit Court of Kanawha County, West Virginia, is clearly wrong in dismissing Plaintiff's Complaint and treating the dismissal as a summary judgment.

9. That this Court enter such Order as is necessary to prohibit the West Virginia State Police from further interference with the business of your Appellant and others similarly situated.

10. That the Court find, conclude and Order that the West Virginia State Police is responsible for attorney's fees to the Plaintiff for failing to provide complete

documentation in response to the Freedom of Information requests made on behalf of the Plaintiff thereby, in part, giving rise to the underlying action, and in forcing this appeal to be prosecuted under statutory and constitutional grounds.

11. Such other and further relief as the Court deems just.

M & J Garage and Towing, Inc.,
a West Virginia Corporation
Petitioner - By Counsel

JUDY & JUDY
Attorneys at Law

By: _____
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West Virginia State Bar No. 1939
Counsel for Appellant

CERTIFICATE OF SERVICE

I, J. David Judy, III, counsel for Petitioner, do hereby certify that I have served the foregoing BRIEF OF APPELLANT upon Appellee by mailing a true copy thereof to counsel for Appellee, Virginia Grottendieck Lanham, Assistant Attorney General, at her address of West Virginia State Police, 725 Jefferson Road, South Charleston, West Virginia, 25309, by U. S. Mail, postage prepaid, this 2nd day of February, 2010.

_____
J. David Judy, III