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No. 09-1432

In The Supreme Court Of Appeals Of West Virginia

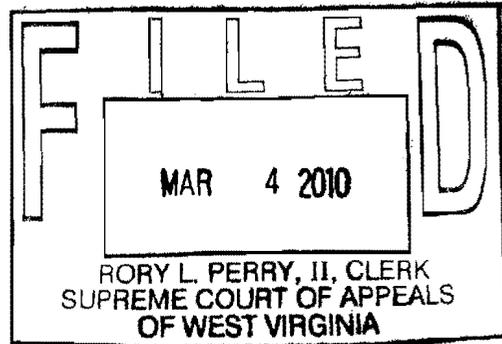
**M & J GARAGE AND TOWING, INC.,
a West Virginia Corporation,**

Appellant,

v.

THE WEST VIRGINIA STATE POLICE,

Appellee.



**Honorable Tod J. Kaufman
Circuit Court of Kanawha County
Civil Action No. 09-C-12**

RESPONSE TO BRIEF OF APPELLANT

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INTRODUCTION

M & J Garage and Towing, Inc. (hereinafter "Appellant" or "M & J") filed an action in the Circuit Court of Kanawha County titled "Complaint for Declaratory Judgment; Petition for Injunctive Relief; and Complaint for Damages, Costs and Attorney's Fees" against the West Virginia State Police (hereinafter, "WVSP")¹ for maintaining a "Wrecker List," for investigating a complaint against Appellant and for removing Appellant from their "Wrecker List" after Appellant refused to cooperate with the investigation which was proceeding pursuant to West Virginia State Police Operational Policy and Procedure. After the action below was filed, the WVSP rescinded the Operational Policy and Procedure at issue. The Honorable Tod J. Kaufman, Judge of the Circuit Court for Kanawha County, West Virginia, correctly held that there is no statutory prohibition to the WVSP creating or using a "Wrecker List" and that the WVSP had not violated any statute or rule either by using a "Wrecker List" or not using a "Wrecker List," and he dismissed Appellant's claims. It is from this judgment that the Appellant filed his Appeal. The WVSP respectfully requests that this Court deny Appellant's Appeal because a substantial portion of Appellant's requested relief was obtained, Appellant failed to properly notice its claim for damages and the remainder of Appellant's Complaint fails to state a claim for which relief may be granted.

STATEMENT OF FACTS

Before 2006 there was no stated policy as to how the WVSP would call a wrecker when needed. The practice was to call either the closest wrecker service or the most reliable wrecker service for the given situation. On or about November 15, 2006, the WVSP revised its Wrecker Service policy. The purpose of this policy stated as follows:

¹ See W. VA. CODE § 15-2-2 (State Police is a department of State of West Virginia).

The West Virginia State Police has an obligation to the motoring public to provide protection and service in selecting a wrecker service when towing of a vehicle by the State Police is required. This is accomplished by establishing criteria for wrecker services that will be utilized by the State Police and the use of a State Police Wrecker List from which wrecker services shall be obtained.

(WVSP OPP 23-2, Compl. Exhibit 4) In light of this policy, wreckers or tow trucks may be called to an incident being handled by the WVSP for a variety of reasons and in a variety of ways. First and most importantly, if the matter is purely a traffic incident or the vehicle is not needed for any investigative purpose, the owner of the vehicle can decide which wrecker service he or she wants to use as long as the service can clear the roadway in a reasonable amount of time. If the Trooper has been dispatched to the scene by 911 and the owner has no preference, then 911 will dispatch a wrecker from its rotation list. If the Trooper has been dispatched by his primary communications center, a call to his detachment, he has arrived upon the scene while on patrol, or in the event the vehicle is material evidence in a criminal matter, the WVSP Wrecker Rotation List was used to call a wrecker service. In using its Wrecker Rotation List, the WVSP relied on a preprinted form with each wrecker/towing service listed in alphabetical order (unless recently added, then the new service is at the bottom). When a wrecker was needed, the next wrecker on the list was called. If that service was unavailable or did not answer, the next wrecker service on the list was called until a wrecker service responded to the incident.

Appellant was listed on the WVSP Wrecker Rotation List for Braxton, Lewis and Glenville WVSP Detachments as well as being listed as a heavy hauler on the WVSP Wrecker Rotation list in Harrison County. On May 20, 2008 Lt. D.B. Malcomb, the Inspector for Troop 3, received a complaint that Appellant allegedly grossly overcharged for pulling a tractor trailer out of the median on I-79. Pursuant to WVSP OPP 23-2.10, Lt. Malcomb attempted to investigate this complaint and according to the Trooper the following occurred:

On August 5, 2008 at approximately 0900 hours this officer contacted M&J wrecker service and spoke to owner Matt Brown. This officer explained to Mr. Brown the nature of the complaints and requested his current billing rates. Mr. Brown advised that he has fired some of his drivers and sometimes does not have control of what happens. This officer explained to Mr. Brown that the bill originated from his billing office. This officer gave Mr. Brown the fax number and requested that he send his billing rates. Mr. Brown advised he would.

On this date at approximately 1100 hours Mr. Brown public serviced this officer back and wanted to know who made the complaint, that he has been in business 30 years and had never had any problems. This officer explained that his billing rates would be needed to determine if he was in fact over billing or if he was complying with his PSC scheduled rates. Mr. Brown advised that his billing rates were very confusing and this officer would be unable to understand them. This officer advised Mr. Brown that his rates would be needed and that if failed to cooperate that he may be taken off the rotational wreck log. Mr. Brown advised that he never gets called anyway.

(October 28, 2008 Memo from Lt. Malcomb to Cpt. Trupo, Compl Exhibit 4) Matt Brown's failure to cooperate with the investigation caused Appellant to be in violation of WVSP OPP 23-2.07. As a result, Captain M.J. Trupo, who was then the Commander of Troop 3, removed Appellant from the WVSP wrecker rotation list and sent correspondence to Appellant on October 28, 2008, stating the same. (October 28, 2008 letter from Cpt. Trupo, Compl Exhibit 4) Contrary to Appellant's assertions, until he had retained counsel, at no time did Matt Brown make any requests for information regarding the complaint, nor did he make any requests pursuant to the Freedom of Information Act.

After retaining counsel, multiple telephone conversations and requests for information occurred; yet Appellant did not provide any information regarding the complaint until just prior to filing the action below. (December 2, 2008 Letter from Matt Brown to Lt. Malcomb, Compl Exhibit 5)

Appellant alleges that it was not receiving calls from the WVSP in 2008 and that documentation "has not been kept or maintained by the West Virginia State Police." (Appellant's

Brief, page 5) Appellant is clearly misstating the facts as both the wrecker rotation lists and the owner/officer request logs were provided to Appellant for the Braxton, Gilmer, Harrison and Lewis County detachments in February 2009 in response to one of the F.O.I.A. requests. Further, the wrecker rotation lists for the detachments in Braxton, Gilmer and Lewis Counties show that Appellant was called in 2008. The Braxton County "Next on List Wrecker (Braxton Co)" for the year 2008 shows 4 entries for the entire year between March 29, 2008, and November 27, 2008. Appellant was to be dispatched on September 22, 2008; however, the incident occurred Northbound on I-79 at mile marker 67 and because Appellant would have been travelling Southbound from mile marker 96 or 99 nearly 30 minutes by interstate, a closer wrecker service was called. Of nine possible wrecker services to be called in 2008 by the WVSP Sutton Detachment only four received any calls at all. The Gilmer County "Next on List Wrecker (Glenville)" for 2008 has six wrecker/tow services listed and shows Appellant being called on two occasions. Appellant was called twice out of six total calls made for the entire year. Therefore, Appellant received one third of the calls from the Glenville Detachment for 2008. The Lewis County detachment had many more calls for service in 2008. The "Next on List Wrecker (Lewis Co)" contains seven different wrecker/tow services. In 2008 eighteen wrecker services were called from the rotation list and Appellant received four of those calls. Therefore, Appellant received more than twenty percent of the calls in Lewis County in 2008. (See the attached Motion to Supplement the Record)

Appellant filed its action titled "Complaint for Declaratory Judgment; Petition for Injunctive Relief; and Complaint for Damages, Costs and Attorney's Fees" on January 5, 2009, requesting the Court to, among other things, order that the WVSP "**cease and desist the maintenance of the separate 'State Police wrecker list;'**" to cease and desist any investigation

or removal of emergency services, including towing services from any dispatch list; and cease and desist any interference with statutorily mandated county emergency 911 dispatch of wrecker services in the State of West Virginia (emphasis added).” In other words, the original goal of Appellant’s Complaint was to do away entirely with the WVSP wrecker rotation list on the theory that the WVSP did not have the authority to have its own “wrecker lists.”

This suit sparked discussion among the members in the WVSP executive office and it was ultimately concluded that a wrecker rotation list was not necessary. Therefore, prior to the April 1, 2009, hearing the WVSP in fact did away with the WVSP wrecker rotation list by rescinding WVSP OPP 23-2. (See Exhibit to March 30, 2009 WVSP Motion to Dismiss)

On the day of the hearing WVSP advised the Court that they had rescinded the policy. Appellant was clearly stunned and changed his argument to allege that the WVSP was mandated to use 911 to dispatch wrecker services for any and all wrecker needs. Despite the change in argument and allegations the Court correctly found that this action should be dismissed because the WVSP is neither prohibited from using its own “wrecker list” nor must the WVSP use a “wrecker list.” Because that decision was correct, Respondents respectfully request the Court to affirm Judge Kaufman’s ruling in this matter.

ANALYSIS

A. The Standard of Review.

"Appellate review of a circuit court order granting a motion to dismiss a complaint is *de novo*." *Hawkins v. W. Va. Dept. of Pub. Safety*, 223 W. Va. 253, 672 S.E.2d 389, 391 (2008) (citing syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). In dismissing the Complaint, the lower Court focused solely on whether or not the WVSP was required to use a specific method when obtaining wrecker services. The

Court found that the WVSP is under no obligation to use their own or 911's "wrecker list" nor are they prohibited from using their own "wrecker list."

Appellant attempts to throw this Court a "red herring" by implying that somehow the case was also dismissed by summary judgment because of Appellant's failure to provide notice pursuant to the statutory requirement. There is nothing in the lower Court's decision which even implies that the case was dismissed on summary judgment over the statutory notice requirement. The lower Court never addressed this issue in its final Order. Indeed, the only ground for dismissal was that the WVSP was not violating any statutory obligation.

B. The Statutory Mission of the West Virginia State Police clearly encompasses criminal investigations and roadway safety both of which may necessitate the use of wrecker services.

According to Appellant's Complaint, Appellant claims that the only manner in which the State Police may call for a tow truck or wrecker is by using the 911 rotation list and dispatching through 911 centers. This assertion is ludicrous and does not take into account all of the situations in which the State Police must use or have the ability to obtain a wrecker service. Appellant's claim appears to be that the WVSP violated its statutory obligations well as Appellant's rights in having a "Wrecker list" and in not having a wrecker list. (Pet'n for Appeal at 3.) At the outset then, it is important to carefully examine precisely what Appellant thinks the State Police are liable for, because the WVSP clearly has the need to call wrecker services while performing its statutory duties.

The mission of the WVSP is clearly stated and exactly quoted by Appellant.

The West Virginia state police shall have the mission of statewide 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.

W.Va. Code §15-2-12(a). What Appellant refuses to admit is that enforcement of criminal and traffic laws as well as maintaining the safety of the state's public streets, roads and highways will necessitate calling for a wrecker service. In the event the vehicle is the subject of a criminal investigation or evidence in a criminal investigation, the WVSP must determine which towing or wrecker service will remove and if necessary store the vehicle without compromising the investigation or evidentiary integrity of the vehicle. On the occasions when safety dictates the need to remove vehicles from the street, road or highway and when the owner of the vehicle does not want to call a specific wrecker service, the WVSP must call a towing or wrecker service in order to accomplish the mission set forth by the legislature. Appellant refuses to acknowledge that in all instances of roadway safety, the owner of the vehicle may always indicate a preference as to what individual or company removes their vehicle.²

The Appellant attempts to use W.Va. Code §24-6-12 to force the WVSP to use only the 911 "wrecker lists." This code provision clearly applies only to Local Emergency Telephone Systems. The provision which charges "the County Commission or the municipality operating an emergency telephone system or enhanced emergency telephone system to consult with all public safety units, public agencies and available towing services to establish....." is stating that the 911 systems must have a fair and equitable method for calling out towing services and that they must consult all public safety units and the towing companies in order to create this system. W.Va. Code §24-6-12 only relates to the WVSP when a 911 center or Local Emergency Telephone System dispatches the WVSP to an incident. This code provision does not state that law enforcement, fire departments or other first responders must use only the 911 system to call tow trucks and wreckers to criminal investigations, accidents, or other roadside emergencies.

² Of course the requested individual or company must be able to remove the vehicle within a reasonable time frame in order to ensure the safety of the motoring public.

In fact, there are policy reasons why the WVSP cannot use the 911 rotation list for every call to a wrecker or towing service. For instance, in the event a Trooper conducting a criminal investigation finds a vehicle with a deceased body inside and the vehicle must be removed from the scene for further processing and stored as evidence in the criminal matter however the next wrecker on the 911 list does not have a secure facility. The Trooper must have the ability to call a secure facility with appropriate lighting for further processing, protection from the elements and protection from anyone attempting to tamper with evidence. A second example would be if contraband is found in a vehicle but the next wrecker service on the list is a close family member of the owner of the vehicle. The Trooper must have the discretion to call a different wrecker service in these types of situations.

In its Brief, Appellant states that there was no distribution of notice that WVSP OPP 23-2 had been rescinded. Appellant complains that neither the WVSP personnel nor Appellant were provided with Notice that WVSP OPP 23-2 had been rescinded. The WVSP did in fact provide notice to all of its members through Department Memorandum 2009-05 which was issued on March 9, 2009. (WVSP Response to Petition for Contempt; Petition for Injunctive Relief; Motion for Sanctions, Attorney's Fees and Expenses, Exhibit 1) The "Directive Acknowledgement Sheets" were signed by personnel in Troop 3, the area in which Appellant primarily does business and were provided to Appellant in May 2009. (WVSP Response to Petition for Contempt; Petition for Injunctive Relief; Motion for Sanctions, Attorney's Fees and Expenses, Exhibit 1) The WVSP does not, nor is it required, to provide notice to private citizens or corporations of changes to its operational policies and procedures. At the time WVSP OPP 23-2 was rescinded, this matter was before Judge Kaufman and notice was provided within the scope of the case.

Appellant sets forth the reason for the establishment of the Public Service Commission citing several cases in which the Public Service Commission was the Appellee. There is no dispute as to its purpose or that the WVSP was created to serve an entirely different purpose. However, Appellant fails to complete the stated purpose that the WVSP was created to investigate criminal conduct and maintain the safety of the public streets, roads and highways in West Virginia. This second purpose necessitates having the ability to call for a tow truck or wrecker service when needed which clearly incorporates “maintaining the safety of public streets and highways in WV.

C. Whether or not Appellant is affected by a “public interest” has no bearing on the ruling of the Circuit Court.

In the Petition for Appeal and subsequent Brief, Appellant makes some very bold statements about the “public interest,” but Appellant never cites any *law* to support them. There is good reason for this- the Appellant’s statements are simply not the law and the legal precedent does not exist. The argument Appellant makes is really more of a “dollars and cents” argument or a “right to do business” argument. The WVSP can not force the public to use Appellant’s services just as Appellant cannot force the WVSP to use his services. This is a fair market system, and Appellant is free to do business with any individual, corporation or agency that chooses to hire Appellant for the services it provides. No matter how the WVSP chooses to call for wrecker or towing services, the vast majority of the time the service is provided to and paid for by an individual or entity and not the WVSP. Finally, the public’s interest actually rests in being able to request the towing service of their choice to remove their car from the highway and they have that choice in all but those instances in which the vehicle is the subject of a criminal investigation or may contain material evidence in a criminal investigation.

Further, Appellant attempts to make a connection between the public interest and its right to due process which it alleges the WVSP violates by either having a wrecker rotation list or not having a wrecker rotation list.

To have a property interest, an individual must demonstrate more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement to it under state or federal law. Additionally, the protected property interest is present only when the individual has a reasonable expectation of entitlement deriving from the independent source.

syl. pt. 6, *State ex rel Anstey v. Davis*, 203 W.Va. 538, 509 S.E.2d 579 (1998), *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Anstey*, the Petitions for habeas corpus or mandamus of five inmates were consolidated for review by this Court. The inmates had been permitted to use personal computers in their cells for over ten years when prison officials confiscated their computers. The inmates claim that they were deprived of their personal computers without procedural due process of law. In determining whether the inmates had a property interest in their computers the Court stated "Although the Constitution protects property interests, it does not create them. To decide whether the plaintiff had a property interest at stake, we look to see whether some independent source, such as federal, state, or local law, has created an enforceable expectation." *Id.* at 546, 587 quoting *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). The Court found no laws or regulations granting the inmates a property interest in the possession of computers. The inmates themselves cited no law or regulation granting such a property right, rather they relied upon the longstanding policy which allowed the inmates to keep and use personal computers in their cells. The Court noted that policies such as this reside "solely in the discretion of prison administrators." *State ex rel Anstey* at 546, 587. Like the inmates, Appellant cannot cite any law or regulation granting it a property right to be called by the WVSP for towing or wrecker services. Further, any policy relating to whether or

not the WVSP uses a wrecker rotation list, and what businesses may be on that list, is at the discretion of the Superintendent of the WVSP. Therefore, Appellant does not have a property interest in being called for towing services by the WVSP and thus no right to due process in this regard.

D. Appellant fails to assert any argument showing that the Circuit Court's failure to consider the Freedom of Information Act requests made by Appellant's attorney is reversible error.

Appellant alleges that the Circuit Court failed to consider issues relating to Freedom of Information Act requests made by the attorney for Appellant. The next mention of those requests is in the Conclusion section when Appellant requests that "this 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 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."

Appellant's only assignment of error regarding this issue is that 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." (Pet'n for Appeal at 3.) Appellant has not shown that the Court failed to consider the F.O.I.A. requests. Leaving Respondent to conclude that Appellant has abandoned any appeal of this issue they might have intended to make. *See Britner v. Med. Sec. Card, Inc.*, 200 W. Va. 352, 354 n.5, 489 S.E.2d 734, 736 n.5 (1997) ("The defendants' petition for appeal cited as error the circuit court's application of the five year statute of limitations to this case. However, the defendants did not address that issue in their brief and therefore have abandoned that assignment of error.); *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues which

are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."); syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

Assuming arguendo that this Court does not find waiver and without waiving the argument set forth above, Appellant should not prevail on this issue. Appellant filed the suit below on January 5, 2009, the same date that the WVSP sent its response to the last F.O.I.A. request. (See the attached Motion to Supplement the Record) Contrary to Appellant's assertion the WVSP did respond to Appellants F.O.I.A. request. Further, the allegations in the Complaint were based upon whether or not the WVSP was exceeding its statutory authority and/or not meeting its statutory obligations. Therefore, Appellant clearly would have filed his Complaint regardless of the information provided.

Accordingly, the circuit court was correct to dismiss Appellant's claims without considering the Freedom of Information Act requests made prior to the institution of the suit.

CONCLUSION

The West Virginia State Police is charged with many duties including keeping the public streets, roads and highways of the State of West Virginia safe. At various times, a wrecker service must be used to either tow a vehicle that will be used as evidence or to clear the roadway after a traffic accident. These are wholly different circumstances and may require different types of wrecker services or storage facilities. Each geographical area is distinct with regard to the best manner of procuring a wrecker service to assist the public. The West Virginia State Police has used a variety of methods to obtain wrecker services and none of these methods was statutorily prohibited. Judge Kaufman correctly held that Respondents have not violated any statute or rule by either using a "wrecker list" or not using a "wrecker list."

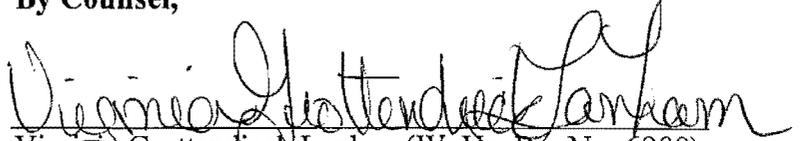
Accordingly, Appelle, the State of West Virginia prays that the Court **DENY**

M & J Garage and Towing, Inc.'s Appeal in its entirety.

Respectfully submitted,

**The West Virginia State Police *and* the State of
West Virginia,**

By Counsel,



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