
No. 09-1432

35466

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

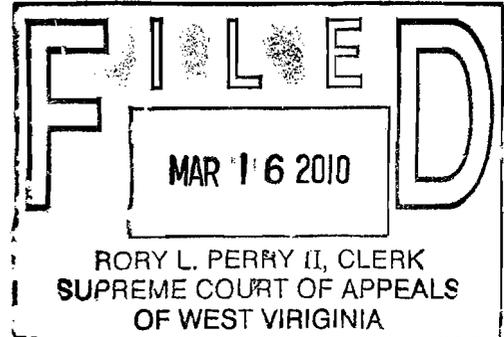
M & J GARAGE AND TOWING, INC.,
a West Virginia Corporation,

Appellant,

vs.

THE WEST VIRGINIA STATE POLICE,

Appellee.



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

REPLY BRIEF OF APPELLANT

Counsel for Appellant

J. David Judy, III, Esquire
W. Va. State Bar No. 1939
Judy & Judy, Attorneys at Law
P. O. Box 636
Moorefield, West Virginia 26836
Telephone: 304-538-7777
Facsimile: 304-538-7407

Counsel for Appellee

Virginia Grottendieck Lanham, Esquire
WV State Bar No. 6900
John A. Hoyer, Esquire
WV State Bar No. 7921
Assistant Attorneys General
West Virginia State Police
725 Jefferson Road
South Charleston, West Virginia 25309
Telephone: 304-746-2100
Facsimile: 304-746-2421

TABLE OF AUTHORITIES

West Virginia Code, Chapter 15, Article 2, Section 12

West Virginia Code, Chapter 15 Article 2, Section 13

West Virginia Code, Chapter 15, Article 2, Section 13(a)

West Virginia Code, Chapter 24A, Article 2, Section 1

West Virginia Code, Chapter 24A, Article 2, Section 2a

West Virginia Code, Chapter 24A, Article 2, Section 3

West Virginia Code, Chapter 55, Article 17, Section 3(a)(1)

INTRODUCTION

The West Virginia State Police (hereinafter "Appellee" or "State Police) have acknowledged and admitted having a policy of dispatch of common carrier wreckers; for a period of time, the State Police maintained a "wrecker list" for the dispatch of common carrier wreckers in the State of West Virginia which is now claimed to have been discontinued; the State Police have admitted investigating civil complaints against a common carrier wrecker service in the State of West Virginia; and the State Police have admitted barring the Appellant from further dispatch for wrecker services in the State of West Virginia upon allegations of "over billing" and that the "Appellant refused to cooperate with the investigation" of the West Virginia State Police. Exhibit 1, Plaintiff's Complaint; Response of Appellee, p.1. These admissions involve actions which violate the statutory limitation of the powers of the West Virginia State Police stated within Chapter 15, Article 2, Section 13(a) of the West Virginia Code. Based upon the admissions of the Appellee, the statutory violations of the State Police go much beyond the simple dispatch of wrecker services, but include the investigation, regulation, enforcement and punishment of common carrier wrecker services in the State of West Virginia in civil rather than criminal processes, and which continues as an ongoing practice.

Appellant will demonstrate herein the failure of the Appellee to comply with the F.O.I.A. requests made on December 24, 2008, not only with regard to statutory untimeliness of the response, but also the failure of the Appellee to provide accurate and complete documents as requested within the F.O.I.A. requests of the Appellant.

The allegations of the Appellee that Appellant failed to properly notice its claim for damages under Chapter 55, Article 17, Section 3(a)(1) is unfounded insofar as notice is not required given the injunctive relief necessary, and when irreparable harm would have occurred by delay of institution of the action. 55-17-3(a)(1). The Court's dismissal of Plaintiff's action below clearly exceeded the Motion to Dismiss filed by Defendant below.

REPLY

The Appellee has absolutely no statutory authority for the dispatch, regulation, investigation, enforcement or punishment of a common carrier wrecker service. The mission of the State Police stated in Chapter 15, Article 2, Section 12, of the West Virginia Code, is not broad enough to allow the State Police to maintain such a policy, and in fact, Chapter 15, Article 2, Section 13(a) of the West Virginia Code is a clear statutory prohibition against allowing the State Police to dispatch, investigate, regulate, enforce and/or punish common carrier wreckers in the State of West Virginia. Appellant has been provided no due process of law; no hearing; no adequate notice; and no adequate opportunity to defend against the unverified and baseless allegations made by Lieutenant Malcolm and as set forth within the Appellee's responsive brief. The Appellant would also dispute the allegations of Lieutenant Malcolm as to any failure to cooperate in an investigation as alleged. Appellant has previously responded to these allegations by Memo dated December 2, 2008, attached to Plaintiff's Complaint below as a part of Exhibit No. 5. Although the court below did not allow the taking of evidence or testimony, the Appellant disputes the allegations made by the Appellee with regard to the "investigation" undertaken by Lieutenant Malcolm.

Matt Brown, an owner of M & Garage and Towing, Inc. (hereinafter "M & J" or "Appellant") made an initial complaint on behalf of M & J with the State Police, prior to any claimed "investigation" of Lieutenant Malcolm, that M & J was not receiving any calls from the State Police for his heavy duty wrecker service. Matt Brown complained that he had not received any calls for their heavy duty wreckers for a period of 18 months. The records provided by the Appellee as partial response to the F.O.I.A. request of the Appellant validate the complaint of the Appellant.

On August 5, 2008, Matt Brown received a telephone call from Lieutenant Malcolm stating that the West Virginia State Police had received "numerous complaints" against M & J Garage for overbilling. Exhibit 5, Plaintiff's Complaint. Lieutenant Malcolm stated that he was checking into these complaints. Matt Brown inquired as to the nature of the complaints, including the date, time and company name, but Lieutenant Malcolm gave no specifics. *Id.* Lieutenant Malcolm requested from Matt Brown a copy of the Public Service Commission rates for towing and recovery of M & J. Matt Brown responded that he did not know that the West Virginia State Police were in charge of pricing, and Lieutenant Malcolm replied "we are not", however, he continued to insist on seeing the PSC rates of M & J. *Id.* Significantly, the towing and recovery rates allowed by the Public Service Commission of the State of West Virginia are readily available on line, and upon information and belief, Lieutenant Malcolm obtained the towing and recovery rates of M & J from the Public Service Commission.

The Appellant received a letter from the West Virginia State Police dated October 28, 2008, advising that M & J Garage and Towing was removed from the State Police

wrecker rotation list based upon a “practice of overbilling and failing to provide information to the State Police as directed”. Exhibit 1, Plaintiff’s Complaint. The letter stated that Lieutenant Malcolm had advised Captain Trupo, commander of Troop 3, Elkins, that Lieutenant Malcolm “has conducted an investigation into your billing practices”, and required submission of billing rates by M & J which M & J failed to do. Captain Trupo stated that “this along with other complaints of overbilling has led me to this decision” (to remove M & J Wrecker Service from the State Police wrecker rotation list). Plaintiff’s Exhibit 1, Complaint below. M & J Garage obtained counsel, and a letter was written to Captain Trupo dated November 6, 2008, stating the position of M & J Garage regarding the “investigation” by the West Virginia Department of Public Safety, and therein requesting information as to complaints pursuant to the Freedom of Information Act. Plaintiff’s Exhibit 3, Complaint below. Counsel for the Appellant received a letter from the West Virginia State Police, Captain Ingold, dated November 20, 2008, together with certain information in response to the November 6, 2008 F.O.I.A. request, all of which is attached to Plaintiff’s Complaint as Plaintiff’s Exhibit 2 below. The information received includes the dispatch policy of the West Virginia State Police, as well as a memo from Lieutenant Malcolm to Captain Trupo dated October 28, 2008, regarding the purported investigation of Lieutenant Malcolm. Id. The information also includes a copy of the Public Service Commission rates of M & J Garage. A responsive letter was written to Captain Ingold by counsel for the Appellant dated December 3, 2008, attached to Plaintiff’s Complaint below as Exhibit 5. Additional information was requested therein pursuant to the Freedom of Information Act in an effort to resolve the dispute between the Appellant and the Appellee below. Another

written to Captain Dawson by counsel for the Appellant dated December 24, 2008, making an additional request pursuant to the Freedom of Information Act to obtain the complete log and dispatches by the West Virginia State Police in the West Virginia counties of Lewis, Doddridge, Gilmer, Braxton, Webster, Upshur, Harrison, Barbour, and Randolph, from June, 2007, through the present (December 24, 2008), in order to identify from documentation the rotation record of each wrecker service dispatched by the West Virginia State Police. Plaintiff's Exhibit 7, Complaint below. Captain Dawson took command of Troop 3 in Elkins when Captain Trupo retired. The "supplemental information" attached to the Appellee's responsive brief is a copy of the entire information received by the Appellant by postmark dated January 21, 2009. A copy of the envelope and postmark in which the F.O.I.A. documentation was received pursuant to the December 24, 2008, letter, is attached hereto as Reply Exhibit 1. A formal request was made for information from the Defendant below by Plaintiff below in the form of Interrogatories and Requests for Production of Documents. The Response of Appellee to those discovery requests by certificate of service dated February 25, 2009, is attached hereto as Reply Exhibit 2. A followup letter was sent to counsel for the Appellant dated February 27, 2009, therein requesting complete information as requested within Interrogatories and by F.O.I.A. A copy of the letter dated February 27, 2009, from the law offices of Judy & Judy, Attorneys at Law, to Virginia G. Lanham, Assistant Attorney General, is attached hereto as Reply Exhibit 3. No additional information was provided. During the interim of this dispute between M & J and the State Police, an advisory opinion was issued by the office of the Attorney General of the State of West Virginia dated February 3, 2009, to the president of

the Harrison County Commission which bears some relation to the issues of this action. A copy of the Attorney General opinion dated February 3, 2009, is attached hereto as Reply Exhibit 4. The opinion actually deals with an effort by a municipality to establish its own towing service policy. Id. This opinion dated February 3, 2009, was provided to counsel for the State Police during March, 2009.

Once the date, time and identity of the "complainant" was provided by Lieutenant Malcolm and the West Virginia State Police, with correspondence dated November 20, 2008, Matt Brown, on behalf of M & J, responded to the complaint in detail and in writing, dated December 2, 2008, hoping to resolve the entire issue. Exhibit 5, Plaintiff's Complaint. Clearly, the response was not sufficient because the West Virginia State Police then demanded to review two full years of the financial records of M & J Garage prior to considering returning M & J to the dispatch list of the West Virginia State Police. Upon advice of counsel, M & J refused to allow the State Police to review two years of financial records of M & J for a civil investigation of invoicing towing and wrecker charges by M & J. The State Police have no authority to conduct such an investigation, nor to review any financial records of M & J.

At the top of page 4 of the Appellee's brief, the Appellee notes that records were provided in February, 2009, for Braxton, Gilmer, Harrison and Lewis Counties. The records were actually postmarked January 21, 2009, and received by counsel for Appellant on January 26, 2009, in response to the December 24, 2008, request. Again, the records were incomplete for Braxton, Gilmer, Harrison and Lewis Counties, and non-existent for Webster, Upshur, Barbour and Randolph Counties. Followup discovery requests garnered

little additional information. Again, there was no heavy duty wrecker list provided for any county.

At the bottom of page 4 of Appellee's brief, the State Police have added emphasis regarding a portion of the relief requested within the Appellant's Complaint and Petition below, however, the Appellee downplays and diminishes the remaining requests for relief by failing to emphasize the entire relief requested. Appellant clearly was not "stunned" or even surprised by the West Virginia State Police claiming to have rescinded their wrecker dispatch policy. The State Police never had the authority to maintain a policy of dispatch of wrecker services to start with. The problem of the dispatch policy of the State Police is much bigger than the simple dispatch of wreckers. The State Police set themselves up to govern and regulate common carrier wreckers by investigation, enforcement and punishment pursuant to in-house procedural mandates enacted by the West Virginia State Police as an administrative agency without any statutory authority whatsoever, and in fact, in violation of the statutory prohibition against the West Virginia State Police involving themselves in civil investigations. 15-2-13(a).

The Appellee makes a number of excuses as to why the State Police cannot use the 911 rotation list for the dispatch of wrecker and recovery services, however, not one of those excuses apply to the Appellant. All other police agencies in West Virginia use 911 for all dispatch where available. Appellee has simply set itself up as its own institution to wield power as the State Police deems fit, governed from the top in its administrative offices in Charleston to investigate, regulate, control and punish private persons and businesses in the State of West Virginia such as the Appellant. The State Police make the

same claim of authority throughout the State of West Virginia in refusing to use the mandated 911 dispatch services in all of the various counties in the State of West Virginia. There are public records of complaints throughout the State by various agencies and emergency responders to the actions of the State Police in mandating their own dispatch service.

The Appellant would again point out that the legislature has declared common carriers by motor vehicle in the State of West Virginia as “affected with a public interest”. 24A-2-1. Perhaps the State Police do not recognize legislative statutory enactments as law. Required reading for the applicable law governing the issues of this case is Chapter 24A, Article 2. Appellant does not make this claim of a “public interest” boldly, but as a victim of the abuse of power of the administration of the State Police wielded against a small business in Weston, West Virginia, and with knowledge of similar complaints by other small wrecker businesses throughout the State of West Virginia. Wrecker services are included by statutory definition as common carriers in the State of West Virginia. 24A-2-2a. The legislature of the State of West Virginia found necessary the designation of the Public Service Commission of the State of West Virginia to have the authority to regulate common carriers, including those in the business of towing and wrecker services. 24A-2-2a. No such statutory authority exists for the benefit of the West Virginia State Police. The legislature was careful to include regulatory limitations and due process protections for the benefit of common carriers affected by the statutory regulation through the Public Service Commission. 24A-2-2a. No such statutory provision exists for the benefit of the State Police. The Public Service Commission is vested with the power and authority to supervise

and regulate all common carriers, including to fix, alter, regulate and determine just, fair, reasonable and sufficient rates, joint rates, charges and classifications, including regulating the operating time and schedules to meet the reasonable needs of a community, as well as to prescribe rules and regulations in conformity with Chapter 24A applicable to all common carriers, and to do all things necessary to carry out an enforce the provisions of Chapter 24A. 24A-2-2a. No such statutory authority exists to allow the West Virginia State Police to regulate, investigate or enforce rates of common carriers, including wrecker services in the State of West Virginia. Any complaint received by the State Police against M & J should have been forwarded or referred to the Public Service Commission for investigation, enforcement and/or punishment by statutory mandate. 24A-2-1 et seq. The abuse of power against wrecker services by the State Police appears to originate with the superior officers, troop commanders, and administration in Charleston, not the rank and file officers in the field. Orders have been issued requiring compliance by field officers.

The Appellee states that the Appellant “cannot cite any law and regulation granting it a property right to be called by the West Virginia State Police for towing and wrecker services”. Appellee Brief at page 10. Appellee further states “Appellant does not have a property interest in being called for towing services by the West Virginia State Police and thus no right to due process in this regard”. Appellee Brief at page 11. Appellant would note that due process originates in the Constitution of the United States of America, and through the Constitution of the State of West Virginia. The West Virginia State Police is an administrative agency of the government of the State of West Virginia. All citizens of the State of West Virginia enjoy the protections of the Constitutions of the State of West

Virginia and the United States of America. These protections are enforced by the court system. The Appellee does not recognize Constitutional protections or the lack of any statutory authority of the West Virginia State Police to dispatch, regulate, investigate, or punish a common carrier as a private citizen in the State of West Virginia. Again, the West Virginia State Police are prohibited from interference with private business other than in a criminal investigation. 15-2-13. 15-2-13 is a statutory mandate prohibiting the West Virginia State Police from the interference with private citizens' property rights, and thus Constitutional protection of property rights.

When the State Police refused to provide sufficient information to Matt Brown and M & J Garage to identify the alleged complainant raised by Lieutenant Malcolm, or the date and time of the alleged complaint, Matt Brown resorted to hiring an attorney, and thereafter, F.O.I.A. requests to obtain full information as to the nature of any complaints allegedly made to the State of West Virginia regarding M & J Garage. Appellee has alleged that Appellant filed suit "on January 5, 2009, the same date that the WVSP sent its response to the last F.O.I.A. request". This statement is only partially true. The response sent by the WVSP on January 5, 2009, was not received until January 8, and that response from WVSP was simply a demand for money prior to providing any records. Payment was made for the records, together with a letter from counsel dated January 8, 2009. Appellee's supplemental records. The records sent were actually received from Charleston on January 26, 2009, in an envelope postmarked January 21, 2009. Those records were incomplete as heretofore stated. Appellant has in no way waived any claim for reimbursement of attorney's fees in this matter. Not only has the Appellee victimized

the Appellant in violation of statutory and Constitutional protections, but the Appellee has also violated statutory mandates of various F.O.I.A. requests made by the Appellant by failing and refusing to provide timely and complete information as requested. Appellant has no other process or protection except through the court system. A small business such as the Appellant cannot take on the administration of the West Virginia State Police without the assistance of the court system. The Appellant recognizes that the Appellee is a very powerful state agency as noted by Judge Kaufman, and the Appellant has suffered economically from the actions of the State Police. During this past winter, with the heavy snows, Appellant may have lost as much as \$100,000.00 in revenue by the refusal of the State Police to call Appellant's business. The State Police are controlling a sector of the economy in West Virginia.

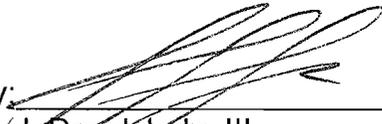
PRAYER

WHEREFORE, your Appellant respectfully requests relief consistent with the brief heretofore filed in this action.

Respectfully submitted.

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

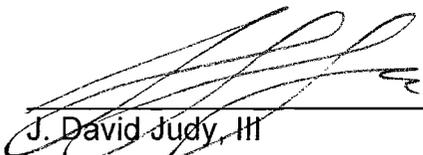
JUDY & JUDY
Attorneys at Law

By: 

J. David Judy, III
P. O. Box 636
Moorefield, West Virginia 26836
304-538-7777
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 REPLY BRIEF OF APPELLANT upon the West Virginia Supreme Court of Appeals by mailing an original and nine copies thereof to Rory L. Perry, II, Clerk, at 1900 Kanawha Boulevard, East, State Capitol, Building 1, Room E-317, Charleston, West Virginia, 25305; and 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 15 day of March, 2010.



J. David Judy, III