
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35560

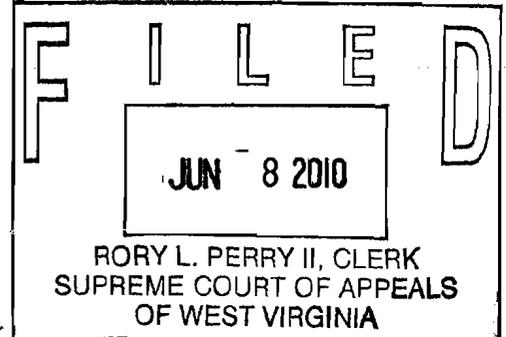
CRAIG A. HARE,

Petitioner below, Appellee,

v.

**JOE E. MILLER, Commissioner, West
Virginia Department of Motor Vehicles,**

Respondent below, Appellant.



INITIAL BRIEF

SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTS	1
III. STANDARD OF REVIEW	3
IV. ARGUMENT	3
A. The DMV driver's license revocation hearing process	3
B. Mr. Hare was not denied due process and the David v. Comm'r of the West Virginia Division of Motor Vehicles, 219 W. Va. 493, 637 S.E.2d 591 (2006) opinion does not apply here	4
C. Mr. Hare is not entitled to attorneys fees and costs	10
V. CONCLUSION	11

TABLE OF AUTHORITIES

	Page
STATUTE	
<i>Board of Rev. v. Gatson</i> , 210 W. Va. 753, 559 S.E.2d 899, (2001)	3
<i>Breithaupt v. Abram</i> , 352 U.S. 432, (1957)	5
<i>Buskirk v. Civil Service Comm'n</i> , W. Va. 279, 283, 332 S.E.2d 579 (1985)	5
<i>Choma v. West Virginia Div. of Motor Vehicles</i> , 210 W. Va. 256, 557 S.E.2d 310, (2001)	4
<i>Cook v. Oberly</i> , 459 A.2d 535, 539 (Del. Ch. Ct. 1983)	6
<i>Cooper v. Stump</i> , 619 S.E.2d 257, 217 W. Va. 744 (2005) (per curiam)	9
<i>David v. Comm'r of the West Virginia Division of Motor Vehicles</i> , 219 W. Va. 493, 637 S.E.2d 591 (2006)	4, 7, 8, 10
<i>Grady v. Corbin</i> , 495 U.S. 508, 524 (1990)	6
<i>Graham v. Putnam County Bd. Of Ed.</i> , 212 W. Va. 524, 529-30, 575 S.E.2d 134, (2002)	5
<i>Grillasca v. New York City Housing Auth.</i> , No. 09 Civ. 6392(NRB), 2010 WL 1491806, at *12 (S.D.N.Y. Apr. 7, 2010)	6
<i>Haig v. Agee</i> , 453 U.S. 280, (1981)	6
<i>Hanley v. Richards</i> , 116 W. Va. 127, 178 S.E. 805, (1935)	7
<i>Harless v. First Nat. Bank in Fairmont</i> , 169 W. Va. 673, 289 S.E.2d 692 (1982)	10
<i>Hart v. National Collegiate Athletic Ass'n</i> , 209 W. Va. 543, 550 S.E.2d 79, (2001)	5

<i>Hubbard v. State Farm Indem. Co.</i> , 213 W. Va. 542, 584 S.E.2d 176, (2003)	9
<i>Hutchinson v. City of Huntington</i> , 198 W. Va. 139, 155 n.21, 479 S.E.2d 649 (1996)	7
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, (1963)	6
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18, (1981)	5
<i>Mackey v. Montrym</i> , 443 U.S. 1, (1979)	6
<i>Manchin v. Browning</i> , 170 W. Va. 779, 296 S.E.2d 909, (1982)	7
<i>Martin v. West Virginia Div. of Labor Contractor Licensing Bd.</i> , 199 W. Va. 613, 486 S.E.2d 782 (1997)	3
<i>Pauley v. Gilbert</i> , 206 W. Va. 114, 522 S.E.2d 208, (1999)	3
<i>Pinkerton v. Farr</i> , 159 W. Va. 223, 220 S.E.2d 682, (1975)	4
<i>Price v. Price</i> , 122 W. Va. 122, 7 S.E.2d 510, 510 (1940)	5
<i>Rochin v. California</i> , 342 U.S. 165, (1952)	5
<i>State ex rel. Appleby v. Recht</i> , 213 W. Va. 503, 583 S.E.2d 800,(2002)	6
<i>State ex rel. Cline v. Maxwell</i> , 189 W. Va. 362, 432 S.E.2d 32, (1993)	6
<i>State ex rel. Kutsch v. Wilson</i> , 189 W. Va. 47, 427 S.E.2d 481, (1993)	10
<i>State ex rel. Stump v. Johnson</i> , 217 W. Va. 733, 619 S.E.2d 246 (2005)	9
<i>State ex rel. Vandal v. Adams</i> , 145 W. Va. 566, 115 S.E.2d 489, (1960)	6

Syl. Pt. 1, <i>Abshire v. Cline</i> , 193 W. Va. 180, 455 S.E.2d 549 (1995)	6
<i>Terminiello v. City of Chicago</i> , 337 U.S. 1, (1949)	6
<i>Trimble v. West Virginia Bd. Of Directors</i> , 209 W. Va. 420, 428, 549 S.E.2d 294 (2001)	7
United States v. Dixon 509, U.S. 688 (1993)	6
<i>United States v. Lovasco</i> , 431 U.S. 783, (1977)	5
<i>Van Harken v. City of Chicago</i> , 103 F.3d 1346, (7 th Cir. 1997)	6
 MISCELLANEOUS	
16 C.J.S. <i>Constitutional Law</i> § 1436	5
David Berg, <i>Is There a Future for Trial Lawyers?</i> , 40 S.D. L. REV. 228, 229 (1995)	8
Ellen Wertheimer, <i>Punitive Damages and Strict Products Liability: An Essay in Oxymoron</i> , 39 VILL. L. REV. 505, 510 (1994)	8
 STATE	
W. Va. Code §17C-5A-2	3

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35560

CRAIG A. HARE,

Petitioner below, Appellee,

v.

**JOE E. MILLER, Commissioner, West
Virginia Department of Motor Vehicles,**

Respondent below, Appellant.

INITIAL BRIEF

I.

INTRODUCTION

In this case, the Circuit Court of Kanawha County issued a writ of prohibition to prevent the Division of Motor Vehicles from holding a hearing on the revocation of Craig A. Hare's driving privileges and further ordered the DMV to pay attorney's fees and costs to Mr. Hare. As these rulings are legally and factually unsupportable, this court should reverse the Circuit Court.

II.

FACTS

Deputy C.A. Martin of the Preston County Sheriff's Department arrested Craig Hare, for driving under the influence of alcohol. Deputy Hare submitted a West Virginia DUI Information Sheet with attachments to the DMV, in which Deputy Martin related in the DUI Information Sheet that Mr. Hare had slurred speech, and glassy bloodshot eyes and a belligerent attitude. Rec. at 13, Ex. 1. The DUI Information sheet also stated that upon

leaving his vehicle, Mr. Hare was staggering and that he was unsteady walking to the roadside and standing. *Id.* Mr. Hare refused to take any of the three standard field sobriety tests. *Id.* After receiving his *Miranda* warnings, Mr. Hare waived his right to remain silent and admitted to drinking “6 or 7 drinks” of vodka. *Id.* The DMV revoked Mr. Hare’s driving privileges. Rec. at 13, Ex. 2.

Mr. Hare timely requested an administrative hearing on the revocation, and requested the attendance of the investigating officer. Rec. at 13, Ex. 4. The only ground asserted for dismissal of the revocation was that “[t]here was no cause for the officer to stop me.” *Id.* By letter of February 18, 2009, DMV set a hearing for April 15, 2009 in Morgantown. DMV issued a subpoena to Deputy Martin on February 18, 2009.

On April 15, 2009, Petitioner appeared with counsel before DMV Hearing Examiner John R. Rundle. After the Hearing Examiner offered and accepted the DUI Information Sheet into evidence, 4/15/09 Tr. at 2. The Hearing Examiner noted that Deputy Martin was not present and that he (the Hearing Examiner) had “not heard anything from the [DMV] Legal Department in Charleston or anything from the Preston County Sheriff’s Department as to any reason why Deputy Martin is not present at [the] hearing today.” *Id.* at 3. Mr. Hare moved to dismiss the revocation, which was denied. *Id.* at 3, 4. Because Mr. Hare asked for the attendance of the investigating officer, the DMV rescheduled the hearing to July 22, 2009 and resubpoenaed Deputy Martin.

On July 14, 2009, Petitioner’s lawyer requested a continuance of the hearing because of a conflict in her schedule, the DMV rescheduled the hearing for September 24, 2009 and issued subpoena to Deputy Martin.

On or about September 4, 2009, Mr. Hare filed a *Petition for Writ of Prohibition*,

Mandamus and Application for Stay in the Circuit Court of Kanawha County. The Circuit Court issued the writ of prohibition and subsequently issued an *Order Granting Motion for Attorney Fees*. Rec. at 54, 90.

III.

STANDARD OF REVIEW

“The standard of appellate review of a circuit court’s order granting relief through the extraordinary writ of prohibition is *de novo*.” Syl. Pt. 1, *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W. Va. 613, 486 S.E.2d 782 (1997). Additionally, “[w]hether the circuit court may award attorney fees against the Division presents a purely legal question. Therefore, . . . review is *de novo*.” *Board of Rev. v. Gatson*, 210 W. Va. 753, 755, 559 S.E.2d 899, 901 (2001).¹

IV.

ARGUMENT

A. The DMV driver’s license revocation hearing process.

At the time of the Circuit Court’s Orders in this case, the pertinent provisions of the West Virginia Code dealing with Administrative License Revocation was West Virginia Code §17C-5A-2 (June 7, 2008).² Subsection 17C-5A-2(d) provided,

Any investigating officer who submits a statement pursuant to section one of this article that results in a hearing pursuant to this section, shall not attend the hearing on the subject of that affidavit unless requested to do so by the

¹Once the Court determines that an award of costs and fees is proper, this Court “accord[s] the lower court’s decision great deference.” *Pauley v. Gilbert*, 206 W. Va. 114, 119, 522 S.E.2d 208, 213 (1999).

²In 2010, the Legislature again made extensive changes to the DUI laws through Senate Bill 186. Senate Bill 186 deleted the language prohibiting the presence of the arresting officer without request.

party whose license is at issue in that hearing or by the commissioner. The hearing request form shall clearly and concisely inform a person seeking a hearing of the fact that the investigating officer will only attend the hearing if requested to do so and provide for a box to be checked requesting the investigating officer's attendance. The language shall appear prominently on the hearing request form. The Division of Motor Vehicles is solely responsible for causing the attendance of the investigating officers[.]

West Virginia Code §17C-5A-2(c) provided, “[f]or the purpose of conducting a hearing, the commissioner may issue subpoenas and subpoenas duces tecum in accordance with the provisions of section one, article five, chapter twenty-nine-a of this code[.]” Subsection (c) further provided that “[t]he commissioner may postpone or continue any hearing on the commissioner’s own motion or upon application for each person for good cause shown. The commissioner shall adopt and implement by a procedural rule written policies governing the postponement or continuance of any hearing on the commissioner’s own motion or for the benefit of any law-enforcement officer or any person requesting the hearing and the policies shall be enforced and applied to all parties equally.”³

B. Mr. Hare was not denied due process and the *David v. Comm’r of the West Virginia Division of Motor Vehicles*, 219 W. Va. 493, 637 S.E.2d 591 (2006) opinion does not apply here.

While due process of law “means fundamental fairness[.]” *Choma v. West Virginia Div. of Motor Vehicles*, 210 W. Va. 256, 260, 557 S.E.2d 310, 314 (2001) (quoting *Pinkerton v. Farr*, 159 W. Va. 223, 230, 220 S.E.2d 682, 687 (1975)), the meaning of fundamental fairness “can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what ‘fundamental fairness’ consists

³Senate Bill 186, see supra fn. 2, deleted the language about procedural rule governing postponement or continuance of any hearing and enforcing the policies equally to all.

of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981). “[D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of ‘decency and fairness’ that has been woven by common experience into the fabric of acceptable conduct.” *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (Brennan, J., concurring in part). “Judges are not free, in defining ‘due process,’” to impose . . . ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.” *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). “The court’s role is not to define due process according to its personal and private notions of fairness.” 16 C.J.S. *Constitutional Law* § 1436 (footnote omitted). *Cf. Syl. Pt. 2, Price v. Price*, 122 W. Va. 122, 7 S.E.2d 510, 510 (1940) (“‘Equity’ is not the chancellor’s sense of moral right, or his sense of what is just and equal, but is a complex system of established law.”). “When all factors have been weighed on the scales of justice, though, this Court remains constitutionally bound to follow the guiding precedents before us, to apply the law as it has been interpreted by our predecessors, and to reach the result prescribed thereby.” *Hart v. National Collegiate Athletic Ass’n*, 209 W. Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam).

Procedural “‘due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case.” *Buskirk v. Civil Service Comm’n*, 175 W. Va. 279, 283, 332 S.E.2d 579, 583 (1985) (per curiam) (quoting *Graham v. Putnam County Bd. of Ed.*, 212 W. Va. 524, 529-30, 575 S.E.2d 134, 139-40 (2002)).

“The determination of the appropriate form of procedural protection requires an evaluation of all the circumstances and an accommodation of competing interests.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 155 n.21, 479 S.E.2d 649, 665 n.21 (1996).

Thus, while “[a] driver’s license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution[,]” Syl. Pt. 1, *Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995), equally the State has “a compelling interest in ensuring the safety of the public roadways[,]” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 517, 583 S.E.2d 800, 814 (2002) (per curiam) (citing *Mackey v. Montrym*, 443 U.S. 1, 17 & 18 (1979)), “an interest recognized to be at least as great as any individual’s interest in his license.” *Cook v. Oberly*, 459 A.2d 535, 539 (Del. Ch. Ct. 1983) (citing *Mackey v. Montrym*, 433 U.S. 1, 17-18 (1979)).⁴ “While the individual’s right to fairness

⁴In his response to the petition for appeal, Mr. Hare argues that “[t]he tragedy of drunk driving ‘cannot excuse the need for scrupulous adherence to our constitutional principles.’” Resp. Pet’n App. at 13 (quoting *State ex rel. Cline v. Maxwell*, 189 W. Va. 362, 367, 432 S.E.2d 32, 37 (1993) (quoting *Grady v. Corbin*, 495 U.S. 508, 524 (1990)). However, “[p]latitudes tell us nothing meaningful about the constitutional propriety of a particular type of governmental action, in a particular statutory and regulatory context, implicating a particular set of individual interests.” *Grillasca v. New York City Housing Auth.*, No. 09 Civ. 6392(NRB), 2010 WL 1491806, at *12 (S.D.N.Y. Apr. 7, 2010). “Reverence for the Constitution is one thing, and a respect for substantial fairness of procedure is commendable. But the exaltation of technicalities of every sort merely because they are raised on behalf of an accused person is a different and a reprehensible thing.” *State ex rel. Vandal v. Adams*, 145 W. Va. 566, 579, 115 S.E.2d 489, 496 (1960) (citation omitted) (Calhoun, J., dissenting). (And, in fact, *Grady* was overruled by *United States v. Dixon*, 509 U.S. 688 (1993)).

“The due process clause is not a straitjacket, preventing state governments from experimenting with more efficient methods of delivering governmental services[.]” *Van Harken v. City of Chicago*, 103 F.3d 1346, 1351 (7th Cir. 1997). Generalized approbations of individual rights asserted in the abstract are never disagreeable, but courts do not deal with theory; they confront everyday problems of real government and, when the courts review such reality, they must “temper . . . doctrinaire logic with a little practical wisdom[.]” *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949), lest the Constitution be turned into a suicide pact for the body politic. See *Haig v. Agee*, 453 U.S. 280, 309-310 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)) (“[w]hile the Constitution protects against invasions of individual rights, it is not a suicide (continued...)”).

must be respected, the [DMV] has a parallel duty to protect the health, safety and welfare of its citizenry.” *Hutchison*, 198 W. Va. at 155 n.21, 155, 479 S.E.2d at 665. And, equally, due process in West Virginia is not a one way street; it grants to state officers the right “to have their lawful public policy decisions vindicated in the courts just as individuals are entitled to vindicate their personal rights at law.” *Manchin v. Browning*, 170 W. Va. 779, 791, 296 S.E.2d 909, 921 (1982).

In order to find some support for its decision to issue the prohibition, the Circuit Court found that this Court “has addressed almost identical issues as those raised in the present Petition [for Prohibition] in *David v. Comm’r of the West Virginia Division of Motor Vehicles*, 219 W. Va. 493, 637 S.E.2d 591 (2006).” Rec. at 55. The *David* case bears no pertinent similarities to the instant case and, because the facts which justified the ruling in *David* are absent here. *Trimble v. West Virginia Bd. of Directors*, 209 W. Va. 420, 428, 549 S.E.2d 294, 302 (2001) (“Constitutional due process protections are to be defined by the facts of a particular case.”). Hence, *David* is inapplicable. “[C]essante ratione legis cessat ipsa lex.” *Hanley v. Richards*, 116 W. Va. 127, 178 S.E. 805, 807 (1935).

In *David*, a DMV hearing was set for October 4, 2004, at 12:30 p.m. *Id.* at 494, 637 S.E.2d at 592. DMV issued a subpoena at David’s request on Trooper Adkins, the arresting officer. *Id.*, 637 S.E.2d at 592. David, his counsel and witnesses, appeared for the hearing but Trooper Adkins did not, apparently having telephoned the hearing examiner twice and telephonically obtained “continuances” lasting until 3:00 p.m., because he was in Fayette County Magistrate Court-about a thirty minute drive to the DMV hearing. *Id.* at 495, 637

⁴(...continued)
pact.”).

S.E.2d at 593. David and his counsel assumed the hearing would start at 3:00 p.m.; however, Trooper Adkins did not appear at 3:00 p.m. and David and his counsel left. *Id.*, 637 S.E.2d at 593. Circa October 7, 2004, David's counsel received a copy of a written continuance request, signed by a Fayette County assistant prosecuting attorney and apparently filed with the DMV, stating that Trooper Adkins had been in the Fayette County Magistrate Court and could not attend a 3:00 p.m. October 4, 2004 hearing in the appellant's DMV case. The Fayette County assistant prosecutor's 'continuance request' was accompanied by a certificate of service indicating that the request was mailed to the appellant's counsel on October 5, 2004. *Id.*, 637 S.E.2d at 593. Subsequently, DMV issued a letter ruling in response to the written continuance requests by granting a continuance of the October 4, 2004 hearing and rescheduling it for March 9, 2005, on the ground that "[d]ue to an unexpected delay in Magistrate Court, the Arresting Officer was unable to appear for the scheduled administrative hearing." *Id.* at 496, 637 S.E.2d at 594.

In *David*, the DMV was confronted by an arresting officer who asked the DMV for a continuance. The DMV was in a position, therefore, to be able to judge whether or not a continuance should be granted to the officer. And, in granting the continuance to the officer, the DMV (as this Court found) ran afoul of its own rules because there was no basis for the continuance. As the Court explained its *ratio decendi* in *David*, "Trooper Adkins therefore did not demonstrate grounds for a continuance pursuant to Rule 3.8.4; and the DMV should not have granted a continuance of the October 4, 2004 hearing on that basis." 219 W. Va. at 497, 637 S.E.2d at 595.

David simply applied one of the most fundamental principles of the law, "[l]iability follows fault[,]" David Berg, *Is There a Future for Trial Lawyers?*, 40 S.D. L. REV. 228,

229 (1995), the idea that “[t]he defendant is simply being made to pay for the impact of its blameworthy action on the plaintiff.” Ellen Wertheimer, *Punitive Damages and Strict Products Liability: An Essay in Oxymoron*, 39 VILL. L. REV. 505, 510 (1994). *David* imposed the forfeiture upon that entity who had control over the loss—that is, DMV—which was complicit with the Trooper in allowing the Trooper to avoid the Trooper’s obligation to attend the hearing.

Here, though, Deputy Martin did not seek a continuance and, indeed, DMV did not know why Deputy Martin did not appear. 4/15/09 Tr at 3 (hearing examiner observing he had “not heard anything from the [DMV] Legal Department in Charleston or anything from the Preston County Sheriff’s Department as to any reason why Deputy Martin is not present at [the] hearing today.”). DMV, thus, (unlike in *David*) had no hand in either granting *ab initio*, or ratifying *ex post facto*, Deputy Martin’s non-appearance and was not complicit in Deputy Martin’s non-appearance. In such circumstances, DMV is entitled to be treated as a separate entity from Deputy Martin, see *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 548, 584 S.E.2d 176, 182 (2003) (“The law has long held that separate defendants must be treated separately. In rulings and proceedings, defendants are entitled to preserve their separateness and to not be conflated together. Thus, actions of one defendant in the course of litigation normally cannot be imputed to other defendants.”), and shares no blameworthiness in Deputy Martin’s non-appearance, distinguishing this case from *David*. Indeed, other precedent of this Court’s supports this view of *David*.

In *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005), this Court held the duty of the DMV in protecting the innocent public from drunk drivers precludes any action by, inter alia, a law enforcement officer to interfere with the DMV’s

duty. *See also Cooper v. Stump*, 619 S.E.2d 257, 217 W. Va. 744 (2005) (per curiam). If a police officer can choose not to attend a DMV hearing through no fault of DMV—with the result that the DMV is precluded from holding another ALR hearing—this Court’s decisions in *Johnson* and *Cooper* will have been rendered nugatory:

“This Court has repeatedly recognized that the administrative driver’s license revocation procedures of the Commissioner are meant to protect the public from persons who drive under the influence of alcohol.” *Johnson*, 217 W. Va. at 743, 619 S.E.2d at 256. “Getting drunk drivers off the road is not a game of forfeits.” *State ex rel. Kutsch v. Wilson*, 189 W. Va. 47, 50, 427 S.E.2d 481, 484 (1993). The circuit court should be reversed.

C. Mr. Hare is not entitled to attorneys fees and costs.

The Circuit Court in this case not only prohibited further action by DMV on Mr. Hare’s driver’s license, it ordered the DMV to pay fees and costs. There is no basis for an award of fees and costs.

In *David*, this Court specifically noted that “[t]he DMV, of course, has the option of dismissing the license revocation proceedings instead of payment of the appellant’s fees and expenses.” *David*, 219 W. Va. at 499 n.6, 637 S.E.2d at 597 n.6. This recognition was also consistent with another basic principle of law— that one wrong is entitled to one relief, one is to be made whole, but no more. “[T]he law does not permit a double satisfaction for a single injury[.]” Syl. Pt. 7, in part, *Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982). *David* never permitted *both* a prohibition *and* an award of fees and costs—it only authorized one or the other. As this Court explained, “the circuit court’s denial of the requested writ of prohibition in the instant case must be reversed; because *absent such payment of the appellant’s expenses and fees*, the DMV would be acting in excess of

its jurisdiction in conducting a hearing that violates the appellant's due process right to a full and fair hearing on the merits of his case." *David*, 219 W. Va. at 498-99, 637 S.E.2d at 596-97 (emphasis added). In short, *David* recognized that David could be made whole in one of two ways: (1) pay the attorneys fees and witness costs and have another hearing, or (2) just don't have another hearing. These are mutually exclusive reliefs, though—either one places the driver back into the position they driver would be in but for the DMV's acts. Taken *together*, though, they give the driver a windfall—not having to go to another hearing and not having to pay for the first hearing.

V. CONCLUSION

For the forgoing reasons the Circuit Court should be reversed.

Respectfully submitted,

JOE E. MILLER, Commissioner
West Virginia Division of Motor Vehicles,
By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
Building 1, Room W-435
State Capitol Complex
Charleston, WV 25305
(304) 558-2522