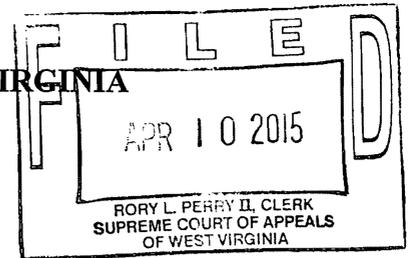


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston



RANDY WAUGH/WAUGH'S
MOBILE HOME PARK,

Petitioner

v.

Docket No. 14-1209

MORGAN COUNTY EMERGENCY
MEDICAL SERVICES BOARD, INC.
and COUNTY COMMISSION OF
MORGAN COUNTY, WEST VIRGINIA,

Respondents.

(From the case of *Morgan County Emergency Medical Services Board, Inc. and County Commission of Morgan County, West Virginia*, Plaintiffs vs. *Randy Waugh/Waugh's Mobile Home Park*, Defendants, Civil Action Nos. 13-C-147, 13-C-148, 13-C-149, 13-C-150 and 13-C-151, consolidated into 13-C-147, in the Circuit Court of Morgan County, West Virginia)

**RANDY WAUGH/WAUGH'S MOBILE
HOME PARK'S REPLY BRIEF**

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**RANDY WAUGH/WAUGH'S MOBILE
HOME PARK'S REPLY BRIEF**

NOW COMES Petitioner, Randy Waugh/Waugh's Mobile Home Park, by counsel, and for Petitioner's Reply Brief, respectfully states as follows:

III. ARGUMENT

A. There is nothing "absurd" about the statutory construction of §7-15-17 of the Code, being a specific provision limiting the authority of the Respondent, Morgan County Emergency Medical Services Board, Inc. ("MCEMSB"), to collect delinquent ambulance fees, and requiring those fees to be collected solely by the County Commission.

On numerous occasions both in Respondents' Response Brief as well as in their argument to the Circuit Court below, Respondents suggest somehow that the Petitioner's argument is "absurd" that the Ambulance Authority does not have authority in its own right to collect delinquent ambulance fees without joining the County Commission as a party plaintiff¹.

Again, in fact, Respondents suggest that because the County Commission of Morgan County elected its option to create an ambulance authority as a separate public corporation, under the provision "may" in §7-15-4 of the *Code*, in order to fulfill its duty to provide emergency ambulance service, this election obviates the necessity to read the entire statute, §7-15-17 of the *Code*. See Argument, Response Brief, pp. 10-15. The only absurdity is that the Respondents fail to read in the entirety the provisions of §7-15-17 *in pari materia* with the other statutory provisions of article fifteen, chapter seven of the *Code*, such that the provisions are read consistently and harmoniously to make all provisions in consonance with the others to ascertain the Legislative intent. *Carolina Lumber Co. v. Cunningham*, 156 W.Va. 272, 192 S.E.2d 722 (1972), syl. pt. 1; *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975), syl. pt. 5; *Owens-Illinois Glass Co. v. Battle*, 151 W.Va. 655, 154 S.E.2d 854 (1967), syl. pts. 1 and 2; and, *Liberty Mutual Ins. Co. v. Morrissey*, _____ W.Va. _____, 760 S.E.2d 863 (W.Va. 2014), syl. pts. 9-12.

Despite what Respondents claim is an absurdity, it requires little deductive reasoning to find that the Legislature's intent is that if the county commission elects to create a new public entity – an ambulance authority – to provide the county's emergency ambulance service under §7-15-4 of the *Code*, then the county commission must impose and collect from the users of the

¹ Apparently, Respondents also suggest that this alleged "absurdity" is directed toward the Attorney General of West Virginia as well since the Attorney General shares Petitioner's opinion. See Attorney General's opinion filed November 12, 2013, dated November 8, 2013, addressed to the Hon. Lucas J. See, Prosecuting Attorney of Hardy County. (App. 40-41).

emergency ambulance service within the county the special emergency ambulance service fee; deposit it into the county special fund for that purpose; and to pay the ambulance authority for those expenditures permitted to be paid pursuant to §7-15-17 of the *Code*². “Absurdity” resolved.

The specific provisions of §7-15-17 of the *Code* provide that the special emergency ambulance service fees must be deposited into a special fund. See §7-1-9 of the West Virginia *Code*. Somehow Respondents suggest that this argument was not raised by Petitioner below. However, Petitioner repeatedly argued to the Circuit Court that the requirement of §7-15-17 of the *Code* imposed special treatment for the collection of the emergency ambulance fees into a special fund, and strict oversight of their disbursement pursuant to §7-15-17 of the *Code*. (See App. pp. 245-246).

Those specific limitations on the use of the special fund in §7-15-17, provide that those fees must be: deposited into a special fund and used only to pay reasonable and necessary expenses actually incurred and the cost of buildings and equipments used in providing emergency ambulance service to residents of the county. The proceeds may be used to pay for, in whole or in part, the establishment, maintenance and operation of an authority, as provided in article fifteen: provided, emergency ambulance fees collected pursuant to this section may not be precluded from making non-emergency transports.

§7-1-9 of the *Code* regarding the creation of special funds authorizes the county courts [now commissions] to create and establish, by proper order, the special funds to be used for any

² In Respondents’ Response Memorandum, pg. 17, Respondents suggest that there is a budgetary issue in this analysis due to repeated shortcomings in the fund to support the operations of Respondent MCEMSB, to which Petitioner asserts is irrelevant to these issues, and a political issue for the county commission to determine the amount of the emergency ambulance fee assessment.

purpose which such courts [commissions] now or hereafter may by the provisions of Chapter 7, Article 11 of chapter 8 of the *Code*, be authorized to accomplish.

Furthermore, §7-1-9 of the *Code* goes on to state:

Expenditures from any special fund created pursuant to the provisions of this section shall be made only for the purpose for which the special fund was created and established: Provided, That in the event of a necessity or emergency the county court [commission], by unanimous vote thereof and upon approval of the state tax commissioner, shall be empowered to transfer funds from any such special fund to the county general fund...

There is no provision in §7-1-9 that county ambulance authorities may use the funds, only county commissions. §7-15-17 of the *Code* is a special provision, which is apart from the general provisions of §7-15-10 of the *Code*, and the general provisions regarding public corporations to which the Respondents eluded in their Response Brief (see pages 12-13).

B. Respondents, in their Response Brief, are selective as to which rules of statutory construction they chose to cite to this Honorable Court, and did not cite the one which is most applicable in the instant case, that specific statutory provisions take precedence over general provisions.

Where there are both general and specific provisions in a statute relating to the same subject matter, “a statute which specifically provides that a thing is to be done in a particular manner normally implies that it shall not be done in any other manner”. See *Hudson v. City of Bluefield*, 234 W.Va. 209, _____, 764 S.E.2d 740, 744 (2014), citing with approval, *Phillips v. Larry’s Drive-in Pharmacy, Inc.*, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007).

Not once within Respondents’ Response Brief do the Respondents ever note that §7-15-17 of the *Code* concerning the creation of the special fund is mandatory (“shall be deposited in a special fund and used only to pay...”).

Again in *Robinson*, this Honorable Court stated, 764 S.E.2d at 745:

“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the subject matter[.]”

Syllabus point 1, in part, *UMWA Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W.Va. 722, 728, 619 S.E.2d 235, 241 (2005) (“[S]pecific statutory language generally takes precedence over more general statutory provisions.”); *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) (“Typically, when statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.” (Citations omitted)); (*Daily Gazette Co., Inc. v. Caryl*, 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989) (“The rules of statutory construction require that a specific statute will control over a general statute[.]” (Citations omitted))).

Where §7-15-17 of the West Virginia *Code* prescribes a specific procedure, whereby funds are to be deposited into a special fund and only paid for specific uses set forth in that statute, that specific statute takes precedence over the general powers granted under §7-15-10 of the *Code* for ambulance authorities and other general rules of law as to powers of a public corporation. There is nothing absurd about employing the proper statutory construction rules to find the obvious result, and most importantly – the Legislature’s intent.

C. The Respondents never state how joint and several liability imposed upon the landlord for ambulance fees satisfies this High Court’s ruling in *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W.Va. 408, 452 S.E.2d 724 (1994), syl. pt. 1, that the county ordinance must tie the burden of the ambulance fee to the usage of the emergency ambulance service in a sufficiently reasonable way to satisfy the requirements of §7-15-17 of the *Code*.

While stating conclusively that the Morgan County ambulance fee ordinance does in fact satisfy the requirements of §7-15-17 of the *Code*, and is tied to the usage, nowhere within the Respondents’ Response Brief do they state how that takes place. Instead, Respondents, concluding with the Circuit Court below, that joint and several liability is permitted under §7-15-17 of the *Code* because of this Honorable Court’s decision in *Ellison v. City of Parkersburg*, 168 W.Va. 468, 284 S.E.2d 903 (1981), where there was an argument by Ellison that the ordinance was invalid because it imposed a charge for the collection and disposal of solid waste on owners and occupants of residential units rather than on the users of that service.

While admittedly, this Honorable Court relied in part upon its decision in *Ellison*, to decide the *Clay County* case (see 192 W.Va. 411, 452 S.E.2d at 727) (“a scheme similar to fees imposed under W.Va. Code 8-13-13 [1971]” as related to the Clay County emergency ambulance assessments), there are two critical factors which render *Ellison* inapplicable in the instant case – one constitutional and statutory, and the other procedural.

Ellison involved a municipality assessing land owners for solid waste and disposal services. Under the instant circumstances, the Morgan County Commission and MCEMSB are assessing land owners and tenants, jointly and severally, for emergency ambulance services.

If solid wastes are not collected and properly disposed, who all may be adversely affected? If emergency ambulance service is not provided, who may be adversely affected? The former appears to be a potential health and safety concern exposing potentially an entire community to disease if solid waste is not collected and disposed of properly. The latter may only affect those individuals who cannot obtain immediate transportation to medical facilities. The former result may be resolved by municipal ordinance under the City of Parkersburg’s plenary power to protect public health and safety under the City’s policy power. *Cf., City of Princeton v. Stamper*, 195 W.Va. 685, 466 S.E.2d 536 (1995), syl. pts. 1 and 2.

The inability of an individual to obtain emergency ambulance service, while directly affecting such individual, may not necessarily create the public health hazard that a failure to collect and dispose of solid wastes may create. Thus, the instant circumstances may not be a public health issue requiring the necessity of the imposition of the police power by a county commission, which it does not have. Secondly, and most importantly is that county commissions do not have plenary power to enact ordinances, but are only imbued with such powers that are expressly granted by the Constitution of the State of West Virginia or are granted by the

Legislature. *State ex rel. State Line Sparkler v. Teach*, 187 W.Va. 271, 418 S.E.2d 585 (1992), syl. pt. 1. This Honorable Court's ruling in *Clay County* is that the burden of the emergency ambulance fee must be tied in a reasonable manner to the users of the ambulance service, and that a residential unit is a satisfactory method to tie that burden. The landlord, being jointly and severally liable for the emergency ambulance fee, is undoubtedly not part of the tenant's residential unit. Hence, the county commission may not exercise plenary power to render a landlord liable for his tenant's ambulance service fee.

Secondly, in *Ellison*, a procedure was provided in that municipal ordinance which "sets up a method whereby liability for the charge is shared between the owner and occupant of the property with a provision for notification to the city of who is user in fact of the service". 168 W.Va. at 471-72, 284 S.E.2d at 905. That notification could exonerate the land owner – landlord from the user fee. 168 W.Va. at 470, 284 S.E.2d at 905.

Here, the Morgan County Assessor requires Petitioner to provide the Assessor with the names, addresses and lot numbers of the tenants before the assessment is made. (See App. 162 for an example of the Assessor's written request to Petitioner; and App. 155-171 for Petitioner's annual responses). The Assessor has the names and addresses of those persons who are occupying the residential units before the assessments are mailed out for the emergency ambulance fees! Where is the administrative difficulty if the names, addresses and lot numbers of the tenants are known BEFORE the ambulance fee assessments are made?

When the Assessor sends out the emergency ambulance assessments, they are mailed solely to Petitioner even though the Ordinance provides that the landlord and tenant are jointly and severally liable; but within the description of the property in the assessments themselves to Petitioner, the Assessor states the names of the tenant (see examples: App. 98, 100, 105, 107,

112, 114, 119, 121, 126 and 128). How much more difficult could it have been for the Assessor just to mail the invoices to the users of the ambulance service, rather than the landlord?

There is no reason to require the landlord to be jointly and severally liable for the emergency ambulance fees of the tenants, unless – of course, the Morgan County Ordinance is nothing but a hidden and unlawful tax forbidden by §7-15-17 of the *Code*, and this Honorable Court’s decision in *Clay County*.

The assessment system need not have absolute equity, but when all of the information is provided to the Assessor of Morgan County to assess the emergency ambulance fees, how much more can the owner do to facilitate the assessment of the users of the emergency ambulance service to whom the burden for the ambulance fee should fairly and equitably fall?

D. If a residential property is unoccupied on the date of assessment, the mobile home unit should not be assessed an emergency ambulance fee within the meaning of the Morgan County Ordinance, and this Honorable Court’s decision in *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W.Va. 408, 452 S.E.2d 724 (1994).

Once again, the Respondents attempt to change the user fee and make it an unconstitutional tax upon real estate. To beg the question, this Honorable Court has stated in *Clay County* that the assessment process must be reasonably tied to the use of the ambulance service.

In the Morgan County Ordinance, it is provided as follows (see App. 66):

The *Special Emergency Ambulance Service Fee* accounts established under this Ordinance shall be paid annually in the amount of Seventy five – (\$75.00) **utilizing the same fee payment and interest and discount schedule methods as for payment of Morgan County real and personal property taxes and fire fees.** [Emphasis added].

Respondents in their Response Brief, on page 25, state the following:

It must be assumed that Petitioner intends to rent the vacant mobile home units. By definition then, the units will not be “permanently occupied” and a fee is owed on the unit.

If, as the Morgan County Ordinance provides, the system by which to assess and pay the ambulance fee is that which is to be employed for real and personal property taxes by the Assessor, this statement is as ridiculous as stating that the Morgan County Assessor may assess personal property taxes on an unlimited amount on a business as it must be assumed that because one has a business, then he or she must intend to have assets to create, operate and run that business. Accordingly, the Assessor may assess virtually any amount for those personal property taxes. Or, if a landowner has a large tract of land, then the Assessor must assume that the landowner is holding that real estate for its highest and best use – perhaps, development into a subdivision, and assess that large tract of real estate as subdivision lots. Respondents’ argument defies logic.

It is the Morgan County Commission, in its Ordinance, who selected the assessment method to be used as that for real estate taxes and personal property taxes as that which is to be employed for the assessment of emergency ambulance fees. Given that selection by the County Commission, that method must be fairly, equitably and uniformly administered. If the property is vacant on the assessment date, then there is no emergency ambulance fee to be paid.

IV. CONCLUSION

For the foregoing reasons, Petitioner prays that this Honorable High Court reverse the Final Order of the Circuit Court of Morgan County dated October 28, 2014, and rule and order that the Respondent, Morgan County Emergency Medical Services Board, Inc., as a separate entity, may not file civil actions to collect delinquent emergency ambulance service fees; rule and order that the Petitioner may not be assessed *jointly and severally* with Petitioner’s tenants who reside in the mobile home units within the Petitioner’s mobile home park since Petitioner is not one of those persons who would use the emergency ambulance service fees from the rented

mobile home units; and, order and rule that the Morgan County Ordinance, to the extent that it requires a residential unit to be permanently unoccupied in order to avoid the assessment of emergency ambulance service fees, violates the enabling statute, §7-15-1, *et seq.* of the West Virginia Code, and only the mobile home units which are occupied as of July 1 of each assessment year, may be assessed the emergency ambulance service fee.

Respectfully submitted this 9th day of April, 2015.

Randy Waugh/Waugh's Mobile Home Park,
Defendant Below, Petitioner
By Counsel



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CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Petitioner, Randy Waugh/Waugh's Mobile Home Park, do hereby certify that I have served a true copy of the foregoing RANDY WAUGH/WAUGH'S MOBILE HOME PARK'S REPLY BRIEF, upon counsel for Respondents, Richard G. Gay, Esq., to his address of Law Office of Richard G. Gay, L.C., 31 Congress Street, Berkeley Springs, WV 25411, by United States Postal Service Mails, postage prepaid and securely affixed, this 9th day of April, 2015.



Michael L. Scales, Attorney at Law