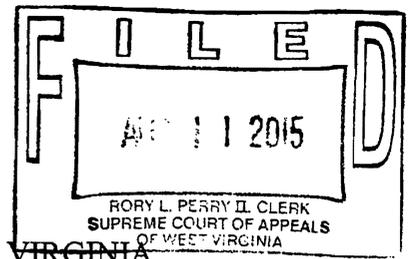


No. 15-0635



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Wiseman Construction Co., Inc., a West Virginia corporation,  
*Defendant Below, Petitioner,*

v.

Maynard C. Smith Construction Company, Inc.,  
a West Virginia corporation,  
*Plaintiff Below, Respondent;*

David Tincher, Director of the Purchasing Division of the  
Department of Administration; West Virginia Lottery Commission,  
a public corporation; John C. Musgrave, Director of the West  
Virginia Lottery; Jason Pizatella, Cabinet Secretary of the Department  
of Administration; and Robert S. Kiss, Cabinet Secretary of the  
Department of Revenue,  
*Defendants Below, Respondents.*

MOTION OF MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.,  
TO SURREPLY TO WISEMAN CONSTRUCTION REPLY

Respondent Maynard C. Smith Construction Company, Inc. (MCS) respectfully moves the Court to accept this surreply to the first argument (pages 1-2) in the August 10 reply of Wiseman Construction Co., Inc. (Wiseman) concerning an issue not raised previously: “that Smith was not licensed at the time it bid on the Lottery Commission job. Its license had previously expired, JA219-220, 76(item no. 8).”

Wiseman is misinformed. The portions of the Appendix cited are passing colloquy between the Circuit Court and Mr. Tincher, who “assumed” that MCS had been given “an opportunity to renew a West Virginia contractor’s license to become the successful bidder” (JA219-220), testimony prompted by the court’s examination of a Purchasing letter dated March 10, 2015 (JA76) requesting submission of “WV Contractor’s License (License submitted with the bid has expired).” In fact, MCS held License “WV000011” throughout the entire period in question, but submitted with its bid a stale paper copy. Promptly after receiving Purchasing’s letter (JA76) on March 10, MCS submitted on March 12, 2015, the requested current copy of its

4827-2491-3190.v1

license. Never made a part of the record, here are the relevant portions of that March 12 submission:



P.O. Box 11888  
 Charleston WV 25339-1888  
 Phone: (304) 825-3190  
 Fax: (304) 825-3228

**Maynard C. Smith  
 Construction Co., Inc.**

State of West Virginia - Department of Administration  
 Purchasing Division, 2019 Washington Street, East  
 Charleston, WV 25305-0130

Date:	03/12/2015	Job No.	LOT1674
Attention:	Evelyn P. Melton Senior Buyer		
Re:	Requisition No. CRFO LOT150000004 Renovations to WV Lottery Headquarters		

- We are sending you:  Attached  Under separate cover the following:
- Sepia  Color Charts  Plans  Specifications
  - Shop Drawings  Change Order  Plans and Specifications. Kindly forward us
  - Copy of Letter  Samples deposit Check in amount of \$ \_\_\_\_\_
  - Catalog Cuts  Supplier  Specific Documents for Purchase Order

Copies	Date	No.	Description	Action
1 original	03/10/2015	014056460	Performance Bond	
1 original	03/10/2015	014056460	Labor and Material Payment Bond	
1 original	03/10/2015	014056460	2-year Maintenance Bond	
1 original	03/10/2015		Certificate of Liability Insurance, including Workers' Compensation	
1 original	03/10/2015		Certificate of Property Insurance (proof of Builder's Risk coverage)	
1	01/20/15-16	WV000011	West Virginia Contractor's License	
1 each			Page 28 and 29 of the solicitation - Executed as requested	
			43	



# CONTRACTOR LICENSE

Authorized by the  
**West Virginia Contractor Licensing Board**

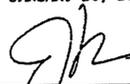
**Number:** WV000011

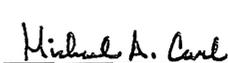
**Classification:**  
 GENERAL BUILDING

MAYNARD C SMITH CONSTRUCTION CO INC  
 DBA MAYNARD C SMITH CONSTRUCTION CO INC  
 PO BOX 11888  
 CHARLESTON, WV 25339-1888

**Date Issued**  
 JANUARY 20, 2015

**Expiration Date**  
 JANUARY 20, 2016

  
 Authorized Company Signature

  
 Chair, West Virginia Contractor

Had the issue ever been raised, this evidence could and would have been submitted.<sup>1</sup> But MCS's licensure had been fully documented a week *before* Wiseman filed its initial protest (JA078) with Purchasing on March 19. Wiseman made no mention of MCS's licensure at that time, or thereafter before the Circuit Court, in its notice of this appeal, in discussions with the other parties about the Appendix, or even in its initial brief. It is far too late for Wiseman to now create a new issue, based on its own misinformation.

During oral argument before this Court, petitioner made much of the fact that the circuit court initially denied respondent's motion for summary judgment and subsequently granted it without any additional developments or discovery. First, and most importantly, we note that petitioner did not assign this as error, nor did petitioner make more than a passing reference to the circuit court's "reversal" of its prior ruling in her brief. West Virginia Rule of Appellate Procedure 10(c)(3) requires the petitioner to include all assignments of error presented for review, which assignments must be accompanied by "an argument exhibiting clearly the points of fact and law presented ... citing the authorities relied on [.]" W.V.R.A.P. 10(c)(7). This Court has repeatedly stated that it "ordinarily will not address an assignment of error that was not raised in a petition for appeal." *Canterbury v. Laird*, 221 W.Va. 453, 458, 655 S.E.2d 199, 204 (2007); *see also Koerner v. West Virginia Dep't of Military Affairs & Pub. Safety*, 217 W.Va. 231, 617 S.E.2d 778 (2005) (refusing to consider an argument in appellant's brief that was not assigned as error in petition for appeal); *Holmes v. Basham*, 130 W.Va. 743, 45 S.E.2d 252 (1947) (same). Moreover, "[a]lthough 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." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996). *See also Morris v. Painter*, 211 W.Va. 681, 685, 567 S.E.2d 916, 920 (2002) (citing cases refusing to address issues not properly briefed or preserved for appeal).

Dellinger v. Pediatrix Medical Group, P.C., 232 W. Va. 115, 119, n. 8, 750 S.E.2d 668, 672 (2013).

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<sup>1</sup> MCS's licensure was also, at all material times, of record on the Internet. *See* [http://www.wvlabor.com/newwebsite/Pages/contractor\\_RESULTS.cfm?wvnumber=WV000011&contractor\\_name=&dba=&city\\_name=&County=&Submit3=Search+Contractors](http://www.wvlabor.com/newwebsite/Pages/contractor_RESULTS.cfm?wvnumber=WV000011&contractor_name=&dba=&city_name=&County=&Submit3=Search+Contractors).

MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.  
*By Counsel*

  
\_\_\_\_\_  
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Nicklaus A. Presley (WV #12293)  
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Charleston, WV 25322  
(304) 340-1000  
pmelick@jacksonkelly.com  
napresley@jacksonkelly.com

CERTIFICATE OF SERVICE

I certify that on August 11, 2015, I caused to be served this MOTION and SURREPLY  
by hand delivery upon:

Kelli D. Talbott, Esq.  
Greg S. Foster, Esq.  
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*State Respondents*

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1018 Kanawha Blvd East  
Suite 1200 Blvd Tower  
Charleston, WV  
*Wiseman Construction Co., Inc.*

  
\_\_\_\_\_  
John Philip Melick