

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 11-0815

JOE E. MILLER, Commissioner,
Division of Motor Vehicles,

Respondent below, Petitioner,

v.

JUSTIN BRANT WOOD,

Petitioner below, Respondent.

BRIEF OF PETITIONER

Scott E. Johnson (WVSB #6335)
Senior Assistant Attorney General
Post Office Box 17200
Charleston, West Virginia 25317-0010
(304) 926-3498
Scott.E.Johnson@wv.gov

TABLE OF CONTENTS

	<u>Page</u>
(I) ASSIGNMENTS OF ERROR	1
A. The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a Second (or Greater) DUI offense is not a conviction	1
(II) STATEMENT OF THE CASE	1
(III) SUMMARY OF ARGUMENT	2
(IV) STATEMENT REGARDING ORAL ARGUMENT AND DECISION	2
(V) ARGUMENT	3
VI. CONCLUSION	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Cisneros v. Alpine Ridge Grp.</u> , 508 U.S. 10, 113 S. Ct. 1898 (1993)	5
<u>In re Cutler</u> , 79 Cal. App. 4th 460, 94 Cal. Rptr. 2d 156 (2000)	5
<u>DeRosa v. Bell</u> , 24 F. Supp. 2d 252 (D. Conn. 1998)	3
<u>Garrison v. Fairmont</u> , 150 W. Va. 498, 147 S.E.2d 397 (1966)	3
<u>Harrison v. Commissioner</u> , 226 W. Va. 23, 697 S.E.2d 59 (2010)	6
<u>Martin v. Randolph County Board of Ed.</u> , 195 W. Va. 297, 465 S.E.2d 399 (1995)	6
<u>Mission Critical Solutions v. United States</u> , 91 Fed. Cl. 386 (2010)	6
<u>Mitchell v. Wheeling</u> , 202 W. Va. 85, 502 S.E.2d 182 (1998)	4
<u>Parkins v. Londeree</u> , 146 W. Va. 1051, 124 S.E.2d 471 (1962)	4
<u>Shomberg v. United States</u> , 348 U.S. 540, 75 S. Ct. 509 (1955)	5
<u>Shoshone Indian Tribe v. United States</u> , 364 F.3d 1339 (Fed. Cir.2004)	6
<u>Smith v. State Work. Comp. Commissioner</u> , 159 W. Va. 108, 219 S.E.2d 361 (1975)	3
<u>Souvannarath v. Hadden</u> , 95 Cal. App. 4th 1115, 116 Cal. Rptr. 2d 7 (2002)	5
<u>Stanley v. Department of Tax and Rev.</u> , 217 W. Va. 65, 614 S.E.2d 712 (2005)	4
<u>State ex rel. Greenbrier County Airport Authority v. Hanna</u> , 151 W. Va. 479, 153 S.E.2d 284 (1967)	3
<u>State ex rel. Kucera v. City of Wheeling</u> , 153 W. Va. 538, 170 S.E.2d 367 (1969)	3
<u>State ex rel. Richey v. Hill</u> , 216 W. Va. 155, 603 S.E.2d 177 (2004)	3
<u>State v. Elder</u> , 152 W. Va. 571, 165 S.E.2d 108 (1968)	4
<u>State v. Lynch</u> , 137 Vt. 607, 409 A.2d 1001 (1979)	5
<u>Staten v. Dean</u> , 195 W. Va. 57, 464 S.E.2d 576 (1995)	3
<u>Town of Beacon Falls v. Towers Golde, LLC, No. CV096001345S</u> , 2010 WL 2365849 (Conn. Super. Ct. May 6, 2010)	5

Under, W. Va. § 17C (d) 2, 4, 6
Velez v. Commissioner of Correction, 250 Conn. 536, 738 A.2d 604 (1999) 5
Watkins v. County of Alameda, 177 Cal. App. 4th 320, 98 Cal. Rptr.3d 847 (2009) 6
Wilshire Insurance Co. v. Home Insurance Co., 179 Ariz. 602, 880 P.2d 1148 (1994) 6

STATUTES:

W. Va. § 17C-5A-1a(e) 2, 4, 6
W. Va. § 17C-5A-3a(d) 2

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0815

**JOE E. MILLER, Commissioner,
Division of Motor Vehicles,**

Respondent below, Petitioner,

v.

JUSTIN BRANT WOOD,

Petitioner below, Respondent.

BRIEF OF PETITIONER

(I)

ASSIGNMENTS OF ERROR

- A. **The Circuit Court Erred in Deciding that a Nolo Contendere Plea to a Second (or Greater) DUI offense is not a conviction.**

(II)

STATEMENT OF THE CASE

Respondent pled nolo contendere to DUI. App'x at 11. He had a previous DUI conviction within the preceding decade. App'x at 18-20. The Commissioner automatically revoked Respondent's license taking the position that a nolo contendere plea to a second DUI (or greater) offense is a conviction. App'x at 12. Disagreeing, the driver filed a petition for a writ for extraordinary relief in the circuit court, which the circuit court granted, holding that an automatic revocation was impermissible. App'x at 4-5.¹

¹The circuit court did provide that the Commissioner could revoke on the basis of the arrest after a hearing. App'x at 5.

(III)

SUMMARY OF ARGUMENT

W. Va. § 17C-5A-1a(e), deals with automatic license revocations for convictions, “For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury. A plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial drivers’ license or operates a commercial vehicle.” The Petitioner, though, is a second offender. Under W. Va. § 17C-5A-3a(d):

(d) Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter or the person’s license is revoked under section two of this article or section seven, article five of this chapter and the person was previously either convicted or his or her license was revoked under any provision cited in this subsection within the past ten years. The minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years, except that the minimum revocation period for a person required to participate because of a violation of subsection (n), section two of this article or subsection (i), section two, article five of this chapter is two months and the minimum period of participation is one year.

Under W. Va. § 17C-5A-3a(d) a nolo contendere plea counts toward revocation and the Petitioner has erred in his reading of the Code.

(IV)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary; the facts and legal argument are adequately presented in the briefs and appeal record, and the decisional process will not be significantly aided by oral argument

(V)

ARGUMENT

The circuit court granted the driver extraordinary relief in this case through a writ of certiorari. App'x at 4. Certiorari does not lie in these circumstances. "It is well settled that the writ of certiorari lies only to review judicial or quasi-judicial actions of an inferior board or tribunal." *Garrison v. Fairmont*, 150 W. Va. 498, 501, 147 S.E.2d 397, 398 (1966). The act of revoking a license is not quasi-judicial, but ministerial; it becomes quasi-judicial only after initiation of adversarial proceedings. *DeRosa v. Bell*, 24 F. Supp.2d 252, 256 (D. Conn. 1998). The circuit court here awarded relief compelling the DMV to afford a merits hearing, this is in the nature of mandamus. See Syl. Pt., 3 *State ex rel. Greenbrier County Airport Auth. v. Hanna*, 151 W. Va. 479, 153 S.E.2d 284 (1967) ("Mandamus lies to require the discharge by a public officer of a nondiscretionary duty."). "The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is de novo." Syl. Pt. 1, *Staten v. Dean*, 195 W. Va. 57, 464 S.E.2d 576 (1995).

[a] writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. Pt. 3, of *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969) A failure to meet any one of the three elements in mandamus is fatal to a claim. *State ex rel. Richey v. Hill*, 216 W. Va. 155, 160, 603 S.E.2d 177, 182 (2004). Since there is no clear legal right to a merits hearing, there is no basis to award a mandamus.

In interpreting any statute, the Court's obligation is to determine legislative intent. Syl. Pt. 1, *Smith v. State Work. Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Legislative intent cannot be gleaned in isolation. "In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety." Syl. Pt. 1, *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962). Thus, "[t]he general rule for interpreting differing statutory sections is that courts should attempt to harmonize them, if possible." *Stanley v. Dep't of Tax and Rev.*, 217 W. Va. 65, 71, 614 S.E.2d 712, 718 (2005). "[N]o part of a statute is to be treated as meaningless and we must give significance and effect to every section, clause, word or part of a statute as well as to the statute as a whole." *Mitchell v. Wheeling*, 202 W. Va. 85, 88, 502 S.E.2d 182, 185 (1998).

W. Va. § 17C-5A-1(e), deals with automatic license revocations for convictions,

For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury. A plea of no contest does not constitute a conviction for purposes of this section except where the person holds a commercial drivers' license or operates a commercial vehicle.

The driver, though, is a second offender. Under W. Va. § 17C-5A-3a(d):

(d) Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter or the person's license is revoked under section two of this article or section seven, article five of this chapter and the person was previously either convicted or his or her license was revoked under any provision cited in this subsection within the past ten years. The minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years, except that

the minimum revocation period for a person required to participate because of a violation of subsection (n), section two of this article or subsection (i), section two, article five of this chapter is two months and the minimum period of participation is one year.

The circuit court ignored the phrase “[n]otwithstanding any provision of the code to the contrary[;]” but this phrase cannot be ignored for that would render it nugatory, a fundamental violation of statutory rules of interpretation. *Shomberg v. United States*, 348 U.S. 540, 545, 75 S. Ct. 509, 512 (1955) (observing, inter alia, that a “notwithstanding” clause” should not be rendered meaningless). And to ignore this phrase also violates its clear, unequivocal, broad, and comprehensive meaning. “[T]he use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 1903 (1993). “[A] clearer statement is difficult to imagine.” *Id.*, 113 S. Ct. at 1903 (citations omitted). The phrase is unequivocal, *Velez v. Commissioner of Correction*, 250 Conn. 536, 544, 738 A.2d 604, 609 (1999) and “comprehensive . . . signal[ing] a broad application overriding all other code sections unless it is specifically modified by use of a term applying it only to a particular code section or phrase[.]” *In re Cutler*, 79 Cal. App.4th 460, 475, 94 Cal. Rptr.2d 156, 166 (2000), and “is sufficiently precise to constitute a specific legislative override of another statute.” *Town of Beacon Falls v. Towers Golde, LLC*, No. CV096001345S, 2010 WL 2365849, at & 2 (Conn. Super. Ct. May 6, 2010). “The phrase ‘(n)otwithstanding any other provision of law’ clearly indicates the legislative intent that [W. Va. § 17C-5A-3a(d)] take precedence over any other enactment dealing with the same subject matter.” *State v. Lynch*, 137 Vt. 607, 611, 409 A.2d 1001, 1004 (1979). “This phrase has a special legal connotation; it is considered an express legislative intent that the specific statute in

which it is contained controls in the circumstances covered by that statute, despite the existence of some other law which might otherwise apply to require a different or contrary outcome.” *Souvannarath v. Hadden*, 95 Cal. App.4th 1115, 1126, 116 Cal. Rptr.2d 7, 14 (2002). “The introductory phrase ‘[n]otwithstanding any other provision of law’ connotes a legislative intent to displace any other provision of law that is contrary’ to the terms of the law introduced by the phrase.” *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386, 402 (2010) (quoting *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1346 (Fed. Cir.2004)).

The “[n]otwithstanding any provision of the code to the contrary,” makes W. Va. § 17C-5A-3a(d) self-contained. See *Wilshire Ins. Co. v. Home Ins. Co.*, 179 Ariz. 602, 604, 880 P.2d 1148, 1150 (1994) (“The use of the words. . . “[n]otwithstanding any statute,” is further evidence of the legislative intent to enact a self-contained article[.]”). If the Legislature presumably means what it says in statutes, *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995)), then the notwithstanding “clause means what it says[.]” *Watkins v. County of Alameda*, 177 Cal. App.4th 320, 344, 98 Cal. Rptr.3d 847, 866 (2009), for purposes of W. Va. § 17C-5A-3a(d), W. Va. § 17C-5A-1a(e) does not exist. And if W. Va. § 17C-5A-1a(e) does not exist, a nolo contendere plea is a conviction under the provisions of W. Va. § 17C-5A-3a(d), see Syl. Pt. 4, *Harrison v. Commissioner*, 226 W. Va. 23, 26, 697 S.E.2d 59, 62 (2010). The Commissioner acted properly in revoking the license upon conviction and the circuit court should be reversed.

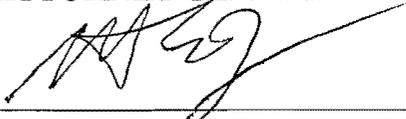
VI.

CONCLUSION

For the above-reasons, the circuit court should be reversed.

Respectfully submitted,
JOE E. MILLER, Commissioner,
Division of Motor Vehicles,
By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



SCOTT E. JOHNSON, (WVSB # 6335)
SENIOR ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317-0010
(304) 926-3874

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 11-0815

JOE E. MILLER, Commissioner,
Division of Motor Vehicles,

Respondent below, Petitioner,

v.

JUSTIN BRANT WOOD,

Petitioner below, Respondent.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for Joe E. Miller, Commissioner of the Division of Motor Vehicles, Petitioner, hereby certify that on the 28th day of July, 2011, I served the foregoing *Brief of Petitioner* upon the following by depositing true and correct copies thereof in the United States Mails, First Class Postage Prepaid addressed as follows:

Michael L. Solomon, Esquire
Solomon & Solomon
Post Office Box 655
Morgantown, WV 26507-0655



SCOTT E. JOHNSON