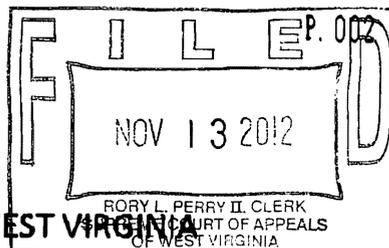


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**STATE OF WEST VIRGINIA EX REL.  
 JOE E. MILLER, Commissioner,  
 West Virginia Division of Motor Vehicles,  
 Petitioner**

v.

**Supreme Court No. 12-1253**

**HONORABLE JOSEPH C. POMPONIO, JR.,  
 JUDGE OF THE CIRCUIT COURT OF POCAHONTAS COUNTY;  
 Respondent**

and

**ERIK T. LARSON  
 Party in Interest**

**SUMMARY RESPONSE OF THE RESPONDENT  
 HONORABLE JOSEPH C. POMPONIO, JR.**

**Comes now the Respondent, in accordance with Rule 16(h) of the West Virginia Revised Rules of Appellate Procedure, and responds to the above styled action. The Petitioner has filed a Petition for Writ of Prohibition seeking the Supreme Court to overrule the Circuit Court's ruling which did not dismiss the administrative appeal of Erik Larson. The Respondent respectfully states as follows:**

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FAX No.

P. 003

1. That the Court's ruling Denying the Motion to Dismiss and allowing the case to go forward does not exceed its legitimate powers in accepting an untimely filed appeal and a writ of prohibition is not proper.

The Petitioner alleges that accepting the appeal violates WV Code §29A-5-4 because the appeal was not filed with the Clerk of Pocahontas County, but rather with the Judge's office, sending a faxed copy to the clerk on the filing deadline. That code section does not actually clarify that the appeal must be filed with the clerk, but rather with the "circuit court." Although the WV Rules of Administrative Procedure, Rule 2, does clarify that the appeal "is commenced by filing a Petition...in the office of the circuit clerk of the circuit court," this Court did not appear in Pocahontas County until April 26<sup>th</sup>, 2012, and failed to instruct the clerk of the correct filing date. There are sound filing rules to which the Court relied on and this Court stands by its ruling in regard to denying the Motion to Dismiss in order to allow a decision to be rendered on the merits of the case, so as to not punish the Petitioner for any errors in filing.

Therefore, the Respondent respectfully requests that the Petitioner's Petition for Writ for Prohibition be Denied.

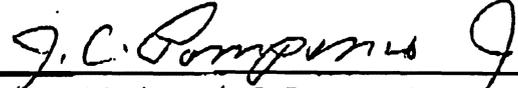
In filing this Summary Response, respondent acknowledges that he has hereby waived his right to an oral argument in this matter.

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FAX No.

P. 004

Respectfully Submitted,

A handwritten signature in cursive script, reading "J. C. Pomponio, Jr.", written over a horizontal line.

The Honorable Joseph C. Pomponio, Jr.



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FAX No.

P. 001

589

*Exhibit A*

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

ERIK T. LARSON  
Petitioner

v.

12-AA-02

JOE E. MILLER, CHIEF HEARING EXAMINER  
OF THE WEST VIRGINIA DIVISION OF MOTOR  
VEHICLES and OFFICE OF ADMINISTRATIVE HEARINGS  
Respondent

ORDER REGARDING RESPONDENT'S MOTIONS TO DISMISS  
AND PETITIONER'S MOTION FOR STAY OF CHIEF EXAMINER'S ORDER

On August 9<sup>th</sup>, 2012, this matter came before the Court for a Motion to Stay the Chief Hearing Examiner's Order filed by the Petitioner. At the hearing, the Respondent served two (2) Motions to Dismiss, and the Court heard argument regarding those motions. Whereupon, the Court hereby makes the following ruling in regard to the Respondent's Motions to Dismiss and the Petitioner's Motion for Stay:

HISTORY:

1. The Petitioner appealed his Order of Revocation for the offense of driving a motor vehicle and refusing to submit to the designated secondary chemical test, which was Affirmed by the Chief Hearing Examiner on March 15<sup>th</sup>, 2012.

POCAHONTAS COUNTY  
CIRCUIT/FAMILY COURT  
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P. 002

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2. The Petitioner filed his Administrative Appeal In Kanawha County on May 1<sup>st</sup>, 2012. Upon Information and belief, the Circuit Court of Kanawha County entered an Order Granting the Respondent's Motion for Dismissal as Untimely on July 27<sup>th</sup>, 2012.
3. The Petitioner also filed an Appeal in the Circuit Court of Pocahontas County, along with a Motion for Stay of the Chief Examiner's Order. The filing date is at issue, although the clerk received the filing fee and original petition, and stamped the Petition filed on April 26<sup>th</sup>, 2012.
4. At the hearing for the Motion for Stay on August 9<sup>th</sup>, 2012, the Respondent filed two (2) motions:
  - a. A Motion to Dismiss for Lack of Jurisdiction and Improper Venue
  - b. A Motion to Dismiss as Untimely
5. The Court gave the Petitioner time to file a Response to the Respondent's motions, and the Petitioner filed a Response on August 17<sup>th</sup>, 2012. In his Response, the Petitioner requests the Court to Deny both motions and to "grant him his costs incurred in his defense of th[ese] frivolous motions...".
6. The Court informed the parties it would make a ruling regarding all pending motions.

STANDARD OF REVIEW

West Virginia Code §29A-5-4(b) states:

(b) Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha County, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the Judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency. A copy of the petition shall be served upon the agency and all other parties of record by registered or certified mail. The petition shall state whether the appeal is taken on questions of law or questions of fact, or both. No appeal bond shall be required to effect any such appeal.

West Virginia Rules of Administrative Procedure, Rule 2:

(a) *Petition.* — An appeal from a state agency final order or decision in a contested case is commenced by filing a Petition for judicial review in the office of the circuit clerk of the circuit court in which venue lies by law. Only issues set forth in the petition or fairly comprised therein will be considered by the circuit court on review.

(b) *Time for Petition.* — No Petition shall be filed from a state agency decision or final order in a contested case after the time period allowed by law. The petition shall be filed in the office of the circuit clerk of the circuit court in which venue lies by law, within 30 days after the petitioner receives notice of the final order or decision from the agency, unless otherwise provided by law.

West Virginia Rules of Civil Procedure, Rule 5(e) states:

e) *Filing with the court defined.* — The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date, except that the Judge may permit the papers to be filed with the Judge, in which event the Judge shall note thereon the filing date and forthwith transmit them to the office of the clerk; the notation by the clerk or

AUG/24/2012/PRI 02:27 PM

FAX No.

P. 004

592

the Judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court. Filing by facsimile is permitted pursuant to the West Virginia Supreme Court of Appeals Rules for Filing and Service by Facsimile Transmsion. Electronic filing and service is permitted in limited circumstances pursuant to Trial Court Rule 15.

West Virginia Circuit Clerk Procedural Manual, Chapter 5.1(c) states:

c. A judge may accept case-initiating documents for filing and should note the date of filing on the document. (Rule 5(e), RCP). If a Judge accepts the case for filing, the clerk should file the case as of the date noted by the Judge, even if a filing fee has not been collected....When this situation arises, the clerk may collect the filing fee after the actual filing of the case.

#### DISCUSSION

A. Concerning the Motion to Dismiss for Lack of Jurisdiction and Improper Venue

West Virginia Code §29A-5-4(b) allows the Petitioner to file in either Kanawha County or in the county where the Petitioner resides or does business.

The Petitioner is a resident of Fredericksburg, Virginia. At the hearing, counsel for the Petitioner argued that he did do business in Pocahontas County, West Virginia. In the Petitioner's Response, the Petitioner asserted that he is the vice president of Larson Steel, Inc., a Virginia corporation, who installs pools, and had installed four (4) pools at Snowshoe in Pocahontas County, West Virginia. This

AUG/24/2012/FRI 02:27 PM

FAX No.

P. 005

593

Court finds that the Petitioner does do business in Pocahontas County of West Virginia, and therefore, would deny the Respondent's Motion to Dismiss for lack of jurisdiction and improper venue because the Petitioner meets the burden of jurisdiction as defined by the code for judicial review of administrative appeals.

**B. Concerning the Motion to Dismiss as Untimely**

This motion deserves more serious consideration. It is not contested that the Petitioner received notice of the ruling of the chief examiner on March 17<sup>th</sup>, 2012, making his thirty (30) day deadline Monday, April 16<sup>th</sup>, 2012. The Petitioner asserts that the proper filing date of the Petition in Pocahontas County is April 13<sup>th</sup>, 2012, and attaches several exhibits to his Response, including a fax transmission to the clerk. Counsel for the Petitioner also delivered the original and the filing fee to this Court's office, to be filed. The faxed copy was not filed on April 13<sup>th</sup>, 2012, because the clerk did not receive the filing fee, as required by West Virginia Code §59-1-11. This Court did not deliver the original and filing fee to the clerk until April 26<sup>th</sup>, 2012, and the clerk properly filed and properly date stamped the document at that time.

It is true that the West Virginia Rules of Administrative Procedure make clear that the Petition shall be filed with the clerk. However, West Virginia code

AUG/24/2012/FRI 02:28 PM

FAX No.

P. 006

594

§29A-5-4(b) does not clarify to file with the clerk, but rather says the circuit court. And the West Virginia Rules of Civil Procedure allow for filings with the judge. This Court did not properly note a filing date on the document, but does acknowledge that the Petition was received on April 13<sup>th</sup>, 2012. While this Court would prefer that the proper procedure for filing with the clerk be followed by counsel, this Court will not punish the Petitioner for any errors in filing. Whenever possible, the Court shall strive to reach decisions based on the merits of a case, and not due to simple errors that were out of the Petitioner's control. Therefore, in light of these facts, this Court will allow the Petition to survive a Motion to Dismiss as Untimely.

The Court will now address the Petitioner's request that the Court grant his costs incurred in defense of these "frivolous" motions. Neither motion was frivolous. In regards to jurisdiction, the Respondent had no evidence before him that the Petitioner did business in Pocahontas County. In fact, he was aware that the Petitioner had already filed in Kanawha County, and the action had been dismissed as untimely. In regards to the timeliness of the Petition, the Respondent was not aware that the Petitioner had given the documents to the Judge, even if he was put on notice that the Petition was to be filed. Further, the more common and accepted practice and the proper procedure as outlined in the

Rules of Administrative Procedure, Is to file with the clerk, and not the court.

Therefore, the Respondent had sufficient grounds to file both motions, and there will be no granting of costs to the Petitioner.

Therefore, this Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. That the Petitioner met his burden in regards to jurisdiction for filing in Pocahontas County, because he does business in Pocahontas County.
2. The proper filing date of the Petition for Appeal is April 13<sup>th</sup>, 2012.
3. It is proper for this Court to make a decision based on the merits of this case.
4. That there is a substantial probability that the appellant shall prevail upon the merits and the appellant will suffer irreparable harm if the order is not stayed.

This Court hereby ORDERS that:

1. That the Respondent's Motion to Dismiss for Lack of Jurisdiction and Improper Venue is hereby DENIED.
2. That the Respondent's Motion to Dismiss as Untimely is DENIED.

AUG/24/2012/FRI 02:28 PM

FAX No.

P. 008

596

- 3. That the Circuit Clerk is directed to correct the filing date of the Petition for Appeal from April 26<sup>th</sup>, 2012, to reflect April 13<sup>th</sup>, 2012.
- 4. That the Petitioner's motions for costs are hereby DENIED.
- 5. That the Petitioner's Motion for a Stay of the Commissioner's Order is hereby GRANTED, not to exceed one hundred and fifty (150) days.

ENTERED this the 24<sup>th</sup> day of August, 2012.



Honorable Joseph C. Pomponio, Jr.

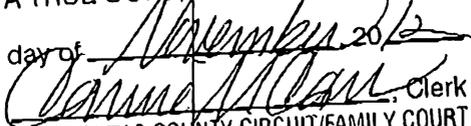
CIRCUIT COURT

POCAHONTAS COUNTY, W.VA.

ENTERED

Date Aug. 24, 20 12

Book 69 Page 589

A TRUE COPY, Certified this 13<sup>th</sup>  
 day of November, 2012  
  
 Clerk  
 POCAHONTAS COUNTY CIRCUIT/FAMILY COURT  
 Marlinton, West Virginia 24954

## CERTIFICATE OF SERVICE

I, Joseph C. Pomponio, Jr., Chief Judge of the Eleventh Judicial Circuit, do hereby certify that a true and exact copy of the Response to the Application for Writ of Prohibition was served upon the parties by mailing a copy of the same, postage prepaid, to the following on the 13<sup>th</sup> day of November, 2012:

Elaine Skorich  
Assistant Attorney General  
DMV- Office of Attorney General  
PO Box 17220  
Charleston, West Virginia 25317  
And via fax 304-926-3498

Jody Wooten, Jr.  
PO Box 2600  
Beckley, West Virginia 25802-2600  
And via fax 304-255-2189

West Virginia Supreme Court of Appeals  
State Capitol  
Building 1, Room E-317  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305  
And via fax 304-558-3815

Handwritten signature of Joseph C. Pomponio, Jr. in black ink, written in a cursive style. The signature includes the initials "JKS" at the end.

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Joseph C. Pomponio, Jr., Chief Judge