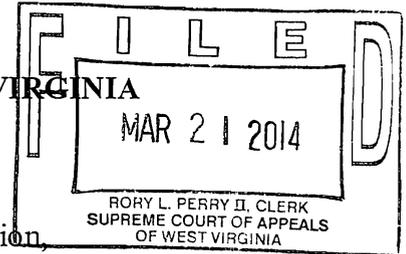


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14- 0273



THE CITY OF BRIDGEPORT, a political subdivision,
THE BRIDGEPORT POLICE DEPARTMENT, a public
Agency of the City of Bridgeport, **JOHN WALKER**, Chief of
Bridgeport Police Department, **A. KIM HAWS**, Bridgeport
City Manager, and **DAN RIGGS TOWING**,
Petitioners/Defendants Below,

vs.

THE HONORABLE JOHN LEWIS MARKS, JR.
Judge of the Circuit Court of Harrison County; and
DOUG'S TOWING, LLC,
A West Virginia Limited Liability Company,
Respondents/Plaintiff Below

**RESPONDENT DOUG'S TOWING'S RESPONSE
TO PETITIONER BRIDGEPORTS'
PETITION FOR WRIT OF PROHIBITION**

Edward R. Kohout, Esq.
West Virginia State Bar Id. No. 4837
The Law Offices of Edward R. Kohout
235 High Street, Suite 307
Morgantown, WV 26505
(304) 777-4086
edko426@gmail.com
Counsel for Respondent, Doug's Towing,
LLC

RESPONSE

There are no grounds to grant a writ of prohibition in this case. This is an ordinary case of denial of a motion for summary judgment and denial of a continuance. The Circuit Court below has not acted beyond its jurisdiction, nor has it exceeded its powers simply by denying Petitioners' motion for summary judgment and setting the case for a jury trial.

This Court has held repeatedly that a writ of prohibition is an extraordinary writ and will be granted only in rare circumstances of "usurpation and abuse of power" or where the court below acts is without jurisdiction of "exceeds its legitimate powers". See W. Va. Code § 53-1-1; and, *State ex rel Peacher, v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). See also *State ex rel Small v. Hon. Russell M. Clawges*, No. 13-0110 (W. Va. June 5, 2013). "The writ does not lie for errors or grievances which may be redressed in the ordinary course of judicial proceedings." *County Court v. Boreman*, 34 W. Va. 362, 366, 12 S.E. 490 492 (1890). The Court has also said that "we cannot issue prohibition when the action of the trial court could be attacked as an abuse of discretion; granting a continuance has always been held by us to be discretionary." *State v. Milam*, 226 S.E.2d 433 (1976).

In *State ex rel Small v. Honorable Russell M. Clawges*, Judge, No. 13-0110 (June 5, 2013) the writ was granted only because the Court felt that the trial court was interfering with a federal case. There, this Court reiterated the five factors which are considered in passing on such a writ: (1) whether the party seeking the writ has no other means of relief, such as direct appeal, (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal, (3) whether the lower court's ruling is clearly erroneous, (4) whether the order is an oft repeated error which disregards substantive or procedural law, and (5) whether the lower court's order raises new and important problems or issues of law of first impression.

The Petitioners City of Bridgeport have no grounds to seek a writ of prohibition since the trial court has not exceeded its legitimate powers by simply denying the petitioner/defendants' motions for summary judgment. Moreover, none of these factors favor staying this case or issuance of a writ.

First, the petitioners/defendants have an adequate remedy by way of **direct appeal** of the trial verdict. They've already told the trial court that they will appeal the verdict. The Court should wait until after the jury trial see the outcome before considering an appeal. It is entirely possible that a jury might rule in the petitioners' favor, which would render this matter moot. Second, the petitioner/defendants can demonstrate no prejudice or damage that would result to them by going ahead with a trial. To the contrary, great damage to plaintiff/respondent Doug's Towing would result in that during the delay in hearing this petition, the petitioners/defendants will continue their illicit practice of giving Riggs a monopoly on Bridgeport's towing and cost plaintiff additional thousands of dollars in lost towing revenue. Third, the trial court's ruling of the legal issues are not clearly erroneous. This Court already refused to review the same legal issues which were certified for review last year. The towing statute speaks for itself and Bridgeport's selfish interpretation contradicts the purpose of the statute. Fourth, the trial court's orders are not oft repeated. Finally, while this case certainly deals with "new and important issues of first impression", those same issues can be decided in a direct appeal.

The respondent feels that the petition for a writ is a transparent tactic to delay this case on the eve of trial. This case was filed over three years ago. The petitioners/defendants have played games and stalled and wasted the Court's time with frivolous motions and interfered with the administration of justice, all for the purpose of maintaining the status quo of allowing the defendants to continue their illegal towing monopoly.

For all of the foregoing reasons, the petition for a writ of prohibition must be refused.



Edward R. Kohout, Esquire
Counsel for Plaintiff/Respondent
W. Va. Bar # 4837
235 High Street, Suite 307
Morgantown, WV 26505
(304) 777-4086
(304) 777-4087 fax

Certificate of Service

I certify that I served a copy of the Plaintiff/Respondent's Response to Petition for Writ of Prohibition via regular prepaid US Mail and fax this 19th day of March 2014 addressed to their counsel:

Tamara J. DeFazio, Esquire
Shuman, McCuskey & Slicer, PLLC
1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Counsel for the City defendants

Daniel C. Cooper, Esquire
Cooper Law Offices, PLLC
240 West Main Street
Bridgeport, WV 26330
Counsel for Defendant Riggs



Edward R. Kohout