



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)

PETITION FOR APPEAL AND NOTE OF ARGUMENT
PETITIONER'S OPENING BRIEF

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III. ASSIGNMENTS OF ERROR

a. The Circuit Court erred when it ruled that the Respondent, Morgan County Emergency Medical Services Board, Inc. (“MCEMSB”), had the authority, in its own right, to bring civil actions to collect delinquent ambulance service fees, when the statute, §7-15-17 of the West Virginia *Code* [1975], clearly provides that only a county commission has the authority to [may] assess and collect those emergency ambulance fees.

b. The Circuit Court erred when it ruled that the provision of the Morgan County Emergency Service Fee Ordinance which provides that a tenant and land owner are joint and severally liable for emergency ambulance fees did not violate the enabling statute, §7-15-1, *et seq.* of the West Virginia *Code* [Emergency Ambulance Service Act of 1975], nor the decision of the Supreme Court of Appeals in *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W.Va. 408, 411, 452 S.E.2d 724, 727 (1994), as the land owner (landlord) is not reasonably related to persons (tenants) who regularly use the emergency ambulance service from the leased location, and does not tie the burden of the ambulance fee to usage of the service in a sufficiently reasonable way to satisfy the requirements of §7-15-17 of the *Code*.

c. The Circuit Court erred when it ruled that the Morgan County Emergency Ambulance Service Fee Ordinance did not violate the enabling statute [§7-15-17 of the *Code*] when it assesses the landlord (owner) of the mobile home rental units for emergency ambulance fees even though those mobile home rental units were unoccupied on the date of assessment, being July 1 of each year.

IV. STATEMENT OF THE CASE

All of the facts in the case are stipulated by the parties, and are encompassed in the Circuit Court's Final Order of October 28, 2014 (App. 276-282), and the exhibits that were stipulated by the parties' Stipulation of Facts (App. 204-234).

Petitioner is the owner of an approximately sixty (60) space mobile home park in Morgan County, south of Berkeley Springs, West Virginia, known as "Waugh's Mobile Home Park". Approximately fifteen (15) mobile home units are owned by the Petitioner, and are located upon spaces within that mobile home park.

Respondent, Morgan County Emergency Medical Services Board, Inc. (hereafter "MCEMSB"), through the Morgan County Assessor, assessed Petitioner for those mobile home units which were rented to third party tenants and also those mobile home units which were vacant on July 1 of each year, being the assessment date for the emergency ambulance fees.

Some time in June of each year, the Assessor of Morgan County, West Virginia, requests from Petitioner the names and addresses of all persons who are residing within the mobile home park for purposes of assessing the emergency ambulance fees. (App. 219). Petitioner provides a listing and map of all sixty (60) mobile spaces in the mobile home park, together with the names and addresses of all of the tenants who are residing within those spaces, and advising the Assessor if any of those lots were unoccupied (not rented-vacant) on July 1 of each year. (App. 212-218; 220-228). Petitioner himself owns approximately fifteen (15) mobile home units which he rents to tenants within his mobile home park, and some of those mobile homes were vacant and not occupied on July 1, but assessed ambulance fees nonetheless.

The Assessor, for those mobile homes which are occupied and rented by third party tenants, even though the mobile home units belong to the Petitioner, assesses ambulance fees for

those mobile homes in Petitioner's name even though the invoice to the Petitioner contains the names of his tenants. (App. 98, 100, 105, 107, 112, 114, 119, 121, 126, 128). The Morgan County Ordinance provides that both land owner and the tenants are jointly and severally liable for the emergency ambulance fees (App. 206, 2d ¶; and App. 199-200, ¶ 11), but the Morgan County Assessor sends the invoice and assesses those emergency ambulance fees only to the Petitioner. (App. 200, ¶ 13).

Petitioner timely pays the emergency ambulance fees for his own personal residence (App. 197, ¶ 1), but objects to paying emergency ambulance fees for his tenants who are residing in mobile home units which are located on the spaces within his mobile home park which are owned by him, and objects to paying for those mobile home units which are vacant and unoccupied on July 1, the Morgan County assessment date for emergency ambulance fees.

Five (5) original Magistrate Court of Morgan County complaints were filed against Petitioner, as defendant below, solely in the name of Respondent, MCEMSB's name as Plaintiff, and not by the County Commission of Morgan County. Petitioner made a motion to dismiss the complaints below on the grounds that the MCEMSB had no authority to bring actions to collect delinquent emergency ambulance fees in light of the clear and unambiguous language of §7-15-17 of the *West Virginia Code*, but the Circuit Court ordered joinder of the County Commission of Morgan County, West Virginia as the party plaintiff below.

The parties stipulated to the facts in this case, and sought and obtained an order from the Circuit Court of Morgan County, West Virginia, briefing the issues in this case, and scheduling same for oral argument which was duly entered by the Circuit Court. In the Final Order of the Circuit Court of Morgan County, West Virginia, entered October 28, 2014, the Circuit Court found for the Respondents on the entirety of the issues. (App. 276-297). By stipulation of the

parties, the Circuit Court permitted the deposit of \$4,000.00 into the Clerk of the Circuit Court to stay the execution of the judgment against Petitioner to seek appeal to this Honorable Court. (App. 282, ¶ 21). That last Order of the Circuit Court was entered on November 6, 2014. (App. 298-299).

V. SUMMARY OF ARGUMENT

This is a case whereby the Honorable Justices of the Supreme Court of Appeals of West Virginia are asked to construe §7-15-17 of the West Virginia *Code* concerning emergency ambulance fees whether the emergency ambulance authorities created by order of the county commission under the authority granted in §7-15-4 of the West Virginia *Code* may *independently* bring civil actions in courts of this state to collect delinquent emergency ambulance fees in light of the clear language of §7-15-17 of the West Virginia *Code*, which states that only county commissions may impose and collect the emergency ambulance fees.

Petitioner's analysis is from statutory construction and the specific code section §7-15-17 of the *Code*, not the general language of §7-15-10 and §7-15-18 of the *Code*. This argument is furthermore advanced because of the language of §7-1-9 concerning the creation of "special funds", and the special restrictions and limitations contained in that general statute, as well as the specific statutory restrictions on the use of ambulance funds that are contained in §7-15-17 itself. The statutory construction is that the county commission alone must establish the special fund for ambulance fees and restrict the use of the ambulance fees to the uses and purposes contained in §7-15-17, consistent with the county commission's constitutional duties to superintend and administer the county's fiscal affairs under Article IX, Section 11 of the West Virginia Constitution.

The second issue stems from a provision in the Morgan County Ambulance Ordinance which creates joint and several liability of the owner of the property and the occupiers thereof (*ie.*, landlord and tenant), for emergency ambulance fees. This scheme of assessment by Morgan County flies in the face of the clear language of §7-15-17, 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), for the imposition of the emergency fee must be tied to the burden upon those to whom the ambulance service is made available. Because the landlord is not a member of the tenants' households, landlords may not be held liable for the tenants' emergency ambulance assessments at the leased location. The Morgan County Ordinance is particularly egregious in holding the landlord liable for the tenants' emergency ambulance fees when the Petitioner, as owner and landlord of the mobile home park, provides the names, lot numbers and addresses of each and every one of Petitioner's tenants who reside within the mobile home park to the Assessor of Morgan County for assessing the emergency ambulance fees on an annual basis.

Lastly, Petitioner's argument is that he should not be required to pay emergency ambulance fees for mobile home units that are unoccupied on July 1 of each year as the Morgan County Ordinance adopts the assessment system for the real estate taxes and personal property taxes in assessing the emergency ambulance fees. If the mobile home units are unoccupied on July 1, there are no persons to whom the ambulance service is made available, and those mobile home units that are unoccupied on July 1 should not be assessed the emergency ambulance fee to be consistent with the terms of the Ordinance applied uniformly and consistently, and this Honorable Court's decision in *Clay County Citizens, supra*.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner, Randy Waugh/Waugh's Mobile Home Park, asserts that oral argument is necessary pursuant to the criteria set forth in Rule 20(a)(2), (3) and (4) of the Rules of Appellate Procedure, for the following reasons:

a. This Honorable Court needs to clarify whether a county emergency ambulance authority, created pursuant to §7-15-4 of the West Virginia Code, may *independently* bring collection actions for delinquent emergency ambulance fees; or whether the County Commission is the proper party pursuant to §7-15-17 of the West Virginia Code, and to give validity to or hold for naught the Attorney General of West Virginia's opinion to the Prosecuting Attorney of Hardy County on November 8, 2013. (App. 27-28). There appears to be a conflict in the various counties as to whether the county commission is the proper party plaintiff for civil actions to collect delinquent ambulance fees.

b. There is a need to clarify 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), as to whether or not assessment of emergency ambulance fees under §7-15-1, *et seq.* of the West Virginia Code [1975], is permitted against a landlord when the tenant is actually the user who may utilize the emergency ambulance service, an issue of fundamental public importance and statutory construction.

c. This Honorable Court needs to decide whether or not a temporarily unoccupied residential rental unit is subject to assessment for emergency ambulance fees under §7-15-1, *et seq.* of the West Virginia Code if there is no user of that service that resides in the residential rental unit on the date of assessment determined by the county commission (July 1), another issue of fundamental public importance and statutory construction.

VII. ARGUMENT

A. Standard of review for this appeal is *de novo*.

Because the parties have stipulated to all of the facts in this case and this case is one of statutory construction, the standard of review by this Honorable Court in consideration of the appeal from the Circuit Court of Morgan County, West Virginia is *de novo*. See *Ewing v. Board of Educ.*, 202 W.Va. 228, 503 S.E.2d 541 (1998); *State ex rel. Farley v. Spaulding*, 203 W.Va. 275, 507 S.E.2d 376 (1998); *Maikotter v. University of W.Va. Bd. of Trustees/West Va. Univ.*, 206 W.Va. 691, 527 S.E.2d 802 (1999); *State v. Paynter*, 206 W.Va. 521, 526 S.E.2d 43 (1999); and, *Young v. McIntyre*, 223 W.Va. 60, 672 S.E.2d 196 (2008).

B. The Circuit Court erred when it ruled that the Respondent, Morgan County Emergency Medical Services Board, Inc. (“MCEMSB”) had the authority, in its own right, to bring civil actions to collect delinquent emergency ambulance service fees, when the statute, §7-15-17 of the West Virginia Code, clearly provides that only a county commission has the authority to [may] assess and collect those emergency ambulance fees.

The Circuit Court in its Final Order concludes that Respondent MCEMSB has the authority in its own right to assess and collect, and to bring civil actions to collect delinquent emergency ambulance service fees. The Circuit Court ruled as follows [App. 285]:

The essential question before the Court is whether that delegation of authority¹ to the MCEMSB lawfully included the ability of the MCEMSB to sue to collect delinquent fees without joining the Morgan County Commission as a co-plaintiff.

The objection by Petitioner to that conclusion is in the specific language of §7-15-17 of the *Code*, which reads as follows:

¹ Petitioner also objects to the Circuit Court’s finding that there was any delegation of authority to collect emergency ambulance fees by the County Commission to MCEMSB as neither the Morgan County Ordinance, nor any other document or county minutes state the proposition of fact that the authority to collect the emergency ambulance fees was delegated to MCEMSB except by the Circuit Court’s supposition from the mere creation of the ambulance authority, MCEMSB, by statute, §7-15-4 of the *Code*.

A county commission **may**, by ordinance, **impose upon and collect** from the users of emergency ambulance service within the county a special service fee, which shall be known as the “special emergency ambulance service fee”. The proceeds from the imposition and collection of any special service fee shall be deposited into a special fund and used only to pay reasonable and necessary expenses actually incurred and the cost of buildings and equipment 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 for in this article: Provided, That an ambulance company or authority receiving funds from the special emergency ambulance fees collected pursuant to this section may not be precluded from making nonemergency transports. [Emphasis added].

The basis of the Circuit Court’s decision is upon the Court’s reliance on §7-15-4 of the West Virginia *Code*, authorizing the County Commission to create a public corporation of an emergency ambulance service authority, and granted the County Commission the right to provide the ambulance service directly through its agent’s servants and employees; or through private enterprise; or by its designees; or by contracting with individuals, groups, associations, corporations, or otherwise; or it may cause such services to be provided by an authority, as provided for in this article. (App. 284-285). The statutory delegation, however, was to provide the ambulance service, **not** collect the ambulance fees. The Circuit Court opined that the creation of MCEMSB *ipso facto* delegated the County Commission’s authority to collect the fees by MCEMSB when the Circuit Court stated: “...the Authority [MCEMSB] can collect the delinquent fees without the [County] Commission being a party because the [county] commission, by creating the Authority, has imbued the authority with all of the powers in the statute and delegated its authority based on the creation of the Ambulance Authority”. (App. 285).

The Circuit Court also relied upon the general provisions granted to an ambulance authority created by the County Commission under §7-5-10 of the West Virginia *Code*, but did not consider the import of the specific statutory provisions of §7-15-17 of the West Virginia

Code. (App. 288-289). Rejecting the reasoning of the Attorney General’s opinion of November 8, 2013 (App. 40-41), the Circuit Court merely recited the oft-cited proposition to which Petitioner concurs that Attorney General opinions are not precedent, citing *State v. Wassick*, 156 W.Va. 128, 133-134, [191 S.E.2d 283, 286-287] (1972). (App. 290).

It clearly appears from the statute, §7-15-17 of the *Code*, that there were additional requirements being placed upon the county commission: to create a special fund; to use the funds specifically as stated in that statute, and as the Attorney General properly pointed out. this duty of the county commission is one of a higher constitutional order, being part of the county commission’s duty to superintend and administer the county’s fiscal affairs under Article IX, Section 11 of the Constitution of the State of West Virginia. (App. 41). However, a county commission is a creature of statute and may only do such things as are authorized by law, ***and in the mode prescribed***. *State ex rel. State Line Sparkler v. Teach*, 187 W.Va. 271, 418 S.E.2d 585 (1992), syl. pt. 1.

A fair reading of §7-15-17 is that the Legislature intended the county commission to receive the funds and to have oversight over the appropriations by the ambulance authority under the terms of the statute, and the limitations set forth therein. §7-15-17 of the *Code* creates a “special fund” for depositing the emergency ambulance user fees from those users to whom emergency ambulance service is made available under the provisions of article 15, chapter 7 of the *Code*. *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W.Va. 408, 452 S.E.2d 724, 726 (1994).

The requirement of creating a “special fund” in §7-15-17 of the *Code* dictates special restrictions for collection and distribution. In particular, §7-1-9 of the *Code* provides, *inter alia* .:

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.

When the particular purpose for which any special fund created pursuant to the provisions of this section has been accomplished or completed, the county commission may transfer any balance remaining therein to the general county fund.

Without the requirement of being a special fund and the specific provisions of §7-15-17 of the *Code*, MCEMSB could collect the delinquent ambulance fees and could subvert the Legislature's intent because the county commission may not be able to determine whether MCEMSB deposited the ambulance fees into the county commission's special fund nor whether those funds were used in the manner prescribed by §7-15-17 of the *Code* for reasonable and necessary expenses actually incurred and the cost of buildings and equipment used in providing emergency ambulance service to residents of the county, and the other specific provisions of §7-1-9 of the *Code* regarding payment by the county commission from the special fund to the general county fund if a county emergency occurs or the special fund's purpose has been accomplished.

If the Circuit Court's conclusion that the county commission may delegate its authority to the ambulance authority to collect the ambulance fees is correct, how would the county commission have the oversight over the use of the funds, and what reason would there have been for the enactment of §7-15-17 of the *Code*? If the county commission may delegate its authority under §7-15-17 of the *Code*, how is the county commission performing its obligations to insure that the ambulance fees are being expended by the ambulance authority "in the mode prescribed" by the Legislature, and fulfilling its constitutional obligations to superintend and administer the county's fiscal affairs? It is the primary rule of statutory construction to ascertain and give effect

to the intention of the Legislature. *McDavid v. U.S.*, 213 W.Va. 592, 584 S.E.2d 226 (2003), syl. pts. 2 and 3.

There is no need to construe the statute if it is clear on its face, and this Honorable Court has ruled that when the statute is clear and unequivocal, there is no need to construe the statute, only to apply it. *Robinson v. City of Bluefield*, 234 W.Va. 209, 764 S.E.2d 740, 743-44 (2014); *Hudok v. Board of Educ. of Randolph County*, 187 W.Va. 93, 415 S.E.2d 897 (1992); and, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). §7-15-17 of the *Code* is clear and unequivocal, and this Honorable Court must apply it that county commissions solely may collect delinquent ambulance fees.

Furthermore, the Circuit Court in utilizing the general powers granted to an ambulance authority in §7-15-4 of the *Code* and §7-15-10 of the *Code*, overlooked the general rule of statutory construction that requires a specific statute be given precedence over a general statute relating to the same subject matter, and the specific statute (here, §7-15-17) shall control. See *Robinson v. City of Bluefield*, 234 W.Va. 209, 764 S.E.2d 740, 745 (2014).

From the *specific* provisions of §7-15-17 of the *Code*, it is the county commission who *may* impose and collect from the users of emergency ambulance service fees within the county a special service fee, and not the ambulance authority created by the county commission which is charged with providing the ambulance service. This Honorable Court has further stated that “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”. *Robinson, supra.*, 764 S.E.2d at 744. §7-15-17 states that only a county commission may impose and collect ambulance fees. Impliedly then, an ambulance authority may not impose and collect ambulance fees.

For the foregoing reasons, the County Commission of Morgan County, West Virginia is the only entity with statutory authority to impose, collect and file civil actions to collect delinquent emergency ambulance fees from the users thereof.

C. The Circuit Court erred when it ruled that the provision of the Morgan County Emergency Ambulance Service Fee Ordinance which provides that a tenant and land owner are jointly and severally liable for emergency ambulance fees did not violate the enabling statute, §7-15-1, *et seq.* of the West Virginia Code [Emergency Ambulance Service Act of 1975], nor the decision of the Supreme Court of Appeals of West Virginia in *Clay County Citizens for Fair Taxation v. Clay County Commission*, 192 W.Va. 408, 411, 452 S.E.2d 724, 727 (1994), as the land owner (landlord) is not reasonably related to persons (tenants) who regularly use the emergency ambulance service from the leased location, and does not tie the burden of the ambulance fee to usage of the service in a sufficiently reasonable way to satisfy the requirements of §7-15-17 of the Code.

Petitioner asserts that he should not be jointly and severally liable with his tenants for the emergency ambulance service fees under the Morgan County Emergency Ambulance Authority Ordinance (App. 279, ¶ 11 and App. 280, ¶ 16), for Petitioner's mobile home units which are rented to his tenants.

Petitioner asserts that the Morgan County Ordinance violates the enabling statute, §7-15-1, *et seq.* of the West Virginia Code and this Honorable Court's decision in *Clay County Citizens for Fair Taxation v. Clay County Commission*, *supra.*, because the Ordinance assesses Petitioner and not the tenant even though Petitioner provides the Morgan County Assessor the names, addresses and lot numbers of tenants who are residing at Petitioner's mobile home units on an annual basis in July for the July 1 assessment date for the emergency ambulance fees.

In the *Clay County* case, this Honorable Court made it clear that such emergency ambulance service fees were permitted if the fees were "imposed in a way reasonably related to the use of the service". See 192 W.Va. at 411, 452 S.E.2d at 727.

Petitioner makes no objection to the emergency ambulance fees that are being assessed for his personal residence and timely pays them, but objects to being assessed and having to pay

emergency ambulance user fees for his tenants who are known by the Assessor by name, location and address. Petitioner asserts that the joint and several liability of the Morgan County Ordinance violates the *Clay County* decision because it assesses him as the landlord, and he is not the user of the service from any of his mobile home park lots. Petitioner asserts that because the ambulance fee is being assessed against Petitioner, as *owner* (landlord), rather than the *user* (tenant) of the ambulance service, the ambulance fee assessments are unreasonably related to the use of the service and cannot be imposed in such a way to simply add to the *ad valorem* property tax. *Id.* 726-727, citing the *City of Moundsville v. Steele*, 152 W.Va. 465, 471, 164 S.E.2d 430, 434 (1968). (“Occupiers”, whether proprietors or tenants, was a reasonable classification on a front foot basis for a service fee for street maintenance, and unoccupied and unimproved property were not assessed).

The Circuit Court, in concluding that the Morgan County Ordinance providing for joint and several liability of the owner and the tenant was valid and enforceable, relied with particularity on this Honorable Court’s decision in *Ellison v. City of Parkersburg*, 168 W.Va. 468, 284 S.E.2d 903 (1981), and opined the erroneous conclusion that the plenary power added for municipal services under §8-13-13(a) of the West Virginia *Code* granted to municipalities, was also granted to county commissions for ambulance fees under the provisions of §7-15-18 of the *Code* by the language of this Honorable Court in the case *Clay County, supra.*, that the two provisions created a “scheme similar to fees imposed under W.Va. Code 8-13-13 [1971]...”. See *Clay County, supra.*, 192 W.Va. at 411, 452 S.E.2s at 727. [App. 292-293].

These two statutes, §8-13-13(a) and §7-15-18, are not remotely akin to one another, and do not grant to county commissions plenary power. In *Ellison*, the assessments for waste disposal and collection were \$48.00 per residential unit. Within that Parkersburg Ordinance,

there was a provision for the rates and charges for solid waste collection and disposal service to be billed to the owners of each and every residential unit; provided, “that upon application by the occupant of any residential unit,... such bill may be rendered to the occupant”. See 168 W.Va. at 473, 284 S.E.2d at 906. The finding that the assessment of the owner for solid waste collection and disposal by the City of Parkersburg passed muster under the enabling statute, and this Honorable Court specifically spoke to the standard of review of a municipal ordinance exercising such plenary power as that granted by West Virginia Code §8-13-13 [1971] is the reasonableness of the ordinance, and a municipal ordinance adopted under a municipality’s plenary power has presumptive validity. *Ellison, supra.*, 168 W.Va. at 472, 284 S.E.2d at 906.

If the Legislature – or this Honorable Court, in construing §7-15-18 of the *Code*, determined that plenary power had been granted to county commissions as to ambulance service, then the test to determine the validity of the Clay County Ordinance assessing households for ambulance service in *Clay County Citizens, supra.* would have been whether the ordinance was a valid exercise of the police power; and, if so, whether the ordinance reasonably classifies the users and the services. See *City of Princeton v. Stamper*, 195 W.Va. 685, 688-689, 466 S.E.2d 536, 539-540 (1995), finding that the City of Princeton’s refuse collection ordinance assessing all residents as users was reasonable and lawful under §8-13-13 of the *Code* granting plenary power to municipalities for essential services in the exercise of the police power.

Lastly, this Honorable Court should be reminded that *Ellison* was decided thirteen years before the *Clay County Citizens* decision. No where within the *Clay County Citizens* decision does this Honorable Court opine that the provisions of §7-15-18 of the West Virginia *Code* grant plenary power to county commissions as to ambulance service and was equivalent to the plenary power granted to municipalities under §8-13-13 of the West Virginia *Code*.

In *Clay County Citizens*, this Honorable Court stated, as follows:

We recognize that perfect equity is impossible to achieve in any tax scheme, but perfect equity is not the test. The fee enacted by the Clay County Commission succeeds in imposing upon and collecting “from the users of emergency ambulance service within the county a special service fee....” Obviously, owners of raw land do not use ambulance services; owners of mineral interests do not use ambulance services; owners of huge farms do not use ambulance services any more frequently than renters of apartments. ***Given the administrative difficulties of collecting the fee on any basis other than a per household basis***, we find that the fee imposed is sufficiently related to the use of the special service for which the fee is imposed that the scheme survives constitutional challenge. An emergency ambulance service fee that taxes each household regardless of the number of members \$25.00 a year to support ambulance services succeeds in tying the burden of the fee to the usage of the service in a sufficiently reasonable way to satisfy the requirements of *W.Va. Code 7-15-17 [1975]* and it is valid, lawful and enforceable under the *W.Va. Code 7-15-17 [1975]*.

Here, the Circuit Court order has the Petitioner, as the owner of the mobile home unit, pay all of the ambulance fee assessments without regard to the fact that the Petitioner is not a member of any of his tenants’ households. Therefore, the joint and several provision does not “t[ie] the burden of the fee to usage of the service in a sufficiently reasonable way to satisfy §7-15-17 of the *W.Va. Code*”.

For these reasons, the Morgan County Ordinance must fail as to holding the landlord liable jointly and severally with the tenant for ambulance fees.

D. The Circuit Court erred when it ruled that the Morgan County Emergency Ambulance Service Fee Ordinance did not violate the enabling statute [§7-15-17 of the Code] when it assesses the landlord (owner) of the mobile home rental units for emergency ambulance fees even though those mobile home rental units were unoccupied on the date of assessment, being July 1 of each year.

The assessment date of July 1 for ambulance fees was adopted by the County Commission of Morgan County in its Ordinance. (See App 294-295; and 207²).

² The Ordinance provides that the ambulance fee of \$75.00 shall be paid annually *utilizing the same fee payment and interest and discount methods as for payment of Morgan County real and personal property taxes* and fire

Because the enabling statute §7-15-1, *et seq.* of the West Virginia Code is silent as to how the assessment of the emergency ambulance service fee may be assessed, the Morgan County Commission decided that it would have the Morgan County Assessor send out a request to Petitioner in late June asking for the names, addresses and lot numbers of the occupants of the Petitioner's mobile home park units be provided by the first week of July in order to be assessed as of July 1 of that current year. (See App. 219). Petitioner has annually complied and provided the information. (See App. 212-218; 220-228).

The Ordinance provides that all residential units that are not *permanently* unoccupied will be assessed emergency ambulance service fees to the owner of the property. Petitioner objects to paying the emergency ambulance service fee for any mobile home units which are unoccupied – either temporarily or permanently – on July 1 as that does not comport with this Honorable Court's decision in *Clay County Citizens, supra*.

The Circuit Court suggested that because Petitioner did not avail himself of the exoneration provision in the Morgan County Ordinance, Petitioner may be somehow barred from asserting its argument; however, the exoneration provision does not apply because the Ordinance clearly provides that unless a residential unit is permanently unoccupied, Petitioner as the owner is liable for the emergency ambulance service fee. Any request for an exoneration would be an exercise in futility because there would be no exoneration of an otherwise purportedly valid assessment under the Morgan County Ordinance as to its unambiguous definition of “permanently unoccupied”, and therefore the failure to exhaust administrative remedies doctrine is inapplicable. See *Hardy v. Richardson*, 198 W.Va. 11, 14, 479 S.E.2d 310, 313-314, n. 3 (1996).

fees (App. 207). July 1 is the assessment date for real and personal property taxes. See §11-4-3(a)(2) and §11-5-3 of the Code, defining “tax year” as to residential real estate.

The Circuit Court, apparently not understanding Petitioner's argument below, stated as follows (App 295):

However, West Virginia courts "will not invalidate a fee merely because a litigant is able to suggest other possible ways of taxation and opine that such examples are more equitable." *Cooper* at 279 [*Cooper v. City of Charleston*, 218 W.Va. 279; 624 S.E.2d 716 (2005)]. Put another way, the fee assessment practice employed need not be *the most* equitable method possible in order to be upheld; it only need be *an* equitable method.

That was not the Petitioner's argument. Petitioner's argument was that if the assessment date chosen by Morgan County is July 1 and the methodology for assessment is like real estate and personal property taxes (App. 207), then that assessment date must be applied uniformly and consistently. If there are no occupants (tenants) residing in the mobile home unit as of July 1, then there are no users to whom the ambulance service may be made available. See *Clay County Citizens, supra.*, syllabus point 1. If there are no occupants of the household unit, there is no one who will use the emergency ambulance service, and the burden of the assessment must be reasonably tied to the users of the ambulance service. *Id.*

The July 1 assessment date creates no greater burden upon the county than do the personal property tax self-assessment forms, whereby the county taxpayers provide to the Assessor the list of the assets owned by the taxpayer on July 1, necessary to assess the personal property tax for the following year.

Why this is considered to be an unreasonable burden on the county for emergency ambulance service fee assessments in this context is a mystery.

The Circuit Court stated in its Final Order [App. 295] as follows:

As pointed out by Plaintiffs [Respondents], dishonest owners of rental property wishing to avoid payment of ambulance fees assessed on July 1 could begin to arrange all of their leases to run July 2 to June 30, completely

dodging the assessment of ambulance fees³. In order to avoid such a practice, it is reasonable for the [County] Commission to employ a procedure which insures that a currently unoccupied property will remain so for the foreseeable future⁴ before exonerating its owner.

This proposition by the Circuit Court is just as ludicrous as suggesting that West Virginia residents move all of their personal property to an out of state location on June 30 of each year so that they may avoid the imposition of the personal property tax assessment for personal property located in West Virginia on July 1. The Respondent County Commission selected the assessment date of July 1, and in order to be assessed in accordance with the *Clay County, supra*. decision of this Honorable Court, the user fees may only be assessed for those properties in which the residential units are occupied on July 1. The Ordinance must tie the burden of ambulance fee in a sufficiently reasonable way to the use of the ambulance service to satisfy the requirements of *W.Va. Code 7-15-17. Id.*, syllabus point 1. No tenants dictate no need for ambulance service at that particular location.

For the foregoing reasons, the residential units which are unoccupied – permanently or temporarily – on July 1 of each year cannot be assessed the emergency ambulance service fees for that assessment year because there are no occupants of the mobile home unit for whom the ambulance service may be provided on that assessment date.

³ Does it make any sense that Petitioner would cause a tenant to move out of Petitioner's mobile home unit renting at \$600-\$700/mo. on June 30 of each year, and then move the same tenants back into that same mobile home unit two days later on July 2 merely to avoid an annual \$75.00 ambulance fee?

⁴ The Ordinance states permanently unoccupied, not unoccupied "for the foreseeable future". (App. 206).

VIII. CONCLUSION

Because the statutory provisions of §7-15-17 of the West Virginia *Code* are specific that the county commission only may assess and collect emergency ambulance fees, that overrides the general provisions granting powers to ambulance authorities which are created by county commissions under that statute, and that the legislative intent in adopting §7-15-17 of the West Virginia *Code* is clear that the county commissions solely retain control over the ambulance fees and supervision of the budget for the county ambulance authorities; and, hence county ambulance authorities, such as Respondent MCEMSB, are not empowered to collect delinquent emergency ambulance service fees through civil actions brought in the courts of this State.

Because county commissions do not have plenary power as do municipalities, and the fact that this Honorable Court's decision in *Clay County Citizens, supra.*, requires that the assessment for emergency ambulance service fees be imposed only upon the users of that ambulance service within the county, the provision in the Morgan County Ordinance imposing those ambulance fee assessments jointly and severally against both the landlords and the tenants violates the decision in *Clay County Citizens*, and the joint and several provision of the Morgan County Ordinance must be struck down as to landlords who do not occupy the leased premises.

Because Morgan County selected the assessment date of July 1 of each year as the date for assessment of emergency ambulance service fees, the date must be applied consistently with the holding in *Clay County Citizens* in determining whether or not a certain residential unit was occupied by persons to whom the ambulance service is made available. If the residential unit is unoccupied – even temporarily, pursuant to the decision of this Honorable Court in *Clay County Citizens*, the fact that Morgan County selected the assessment date and methodology for

assessment, the ambulance fees may not be assessed for unoccupied residential units on July 1 as there are no users who utilize the service for that assessment year.

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 12th day of February, 2015.

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



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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.

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 PETITION FOR APPEAL AND NOTE OF ARGUMENT, PETITIONER'S OPENING 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 12th day of February, 2015.



Michael L. Scales, Attorney at Law