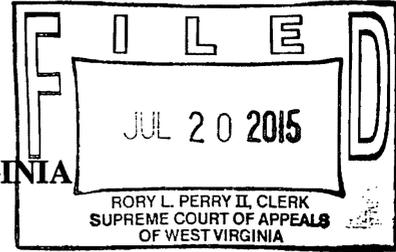


No. 15-0635

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WISEMAN CONSTRUCTION COMPANY, INC.

A West Virginia Corporation, et. al.,

Appellant herein, a Defendant/Respondent below,

v.

MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.,

a West Virginia Corporation, Appellee herein, the Plaintiff/Petitioner below;

DAVID TINCHER, Director of the Purchasing Division of the Department of

Administration; WEST VIRGINIA LOTTERY COMMISSION, a Public Corp;

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.

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**PETITIONER'S BRIEF**

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**II.**  
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**III.**  
**Assignments of Error**

A. The Circuit Court's decision is based upon a clearly erroneous interpretation of the law and application of the law to the facts.

- (1) The Conduct Condemned By The Circuit Court Does Not Rise To The Level Which Shocks The Conscience.
- (2) The Review And The Process Engaged In By The State Was Rational Contrary To The Decision Of The Court.
- (3) The Court Below Was Wrong To Conclude That The State Officials Abused The Wide Discretion Which The Law Provides To Them.

**IV.**  
**Statement of the Case**

The Petitioner Wiseman Construction Company, Inc. (hereinafter Wiseman) and Respondent Maynard C. Smith Construction Co., Inc. (Smith) each submitted bids concerning a project for the West Virginia Lottery Commission. It is undisputed that Smith's base bid of \$7,548,000 was \$174,000 lower<sup>1</sup> than Wiseman's base bid of \$7,722,000, JA79,162. It is also undisputed that Smith failed to comply with the mandatory specification that the bidders for this job shall have completed a minimum of three(3) projects consisting in part or in whole of building entrance and door replacement. . . [and] all bidders shall include at least three (3) references indicating their having completed the three projects as detailed above, JA74.

After first notifying Smith that it was the recommended low bidder, JA75, the West Virginia Lottery determined that Smith had failed to satisfy all mandatory bid submission requirements, therefore the job was awarded to Wiseman as the next lowest bidder, JA79. This

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<sup>1</sup>The total bid difference was \$156,000.

followed an email from Mr. J.C. Linkinlogger of Wiseman Construction which pointed out the deficiency, JA78. At the hearing in this case on April 30<sup>th</sup> Respondent Tinchler testified that in light of this failure. . . “we had to make a decision to either cancel the award and re-award it, or to go forward. . .” JA191-192. He then testified:

“We didn’t believe we had the authority to waive. You know, the law says we are required to award to the *lowest bidder meeting specifications. This is a mandatory specification.* As you pointed out earlier in the bid documents, we didn’t think we had the authority to do that. I mean we had to make a difficult decision,” JA192

....

“Because of the language in the bid documents that said it was a mandatory condition. *It said if mandatory conditions are not met the bid shall be rejected.* We felt our hands were tied. We had no ability to waive or call it a minor irregularity, or take any other action with regard to Maynard C. Smith’s bid,” JA192-193. (Italics Added).

Through its counsel Smith submitted a bid protest, JA31-36. As grounds for the protest Smith complained that nothing in the bid forms informed bidders where or how the three references were to be included, that it possessed no such form designed to comply with this specification, and that the award to Wiseman was “obviously wrong” and “irrational” under the law. Counsel later wrote Director Tinchler that he as the Director was required to waive minor irregularities in bids or specifications and suggested that the information concerning references was erroneously included in the bid instructions, JA38-41.

A panel from the West Virginia Lottery was appointed to verify the mandatory requirements for the purpose of addressing the protest. The panel members were Danielle Boyd, General Counsel, Keith Morgan, IT Director, and Nikki Orcutt, Marketing Deputy Directory,

JA97. After their review the panel recommended Wiseman for the job on the grounds that Wiseman met all mandatory requirements, while Smith had failed to do so, Id. This recommendation was adopted and Smith was so informed of the decision by letter from Director Tincher dated April 21, 2015, JA106-108.

On April 22 Smith filed a Verified Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, JA15. The Circuit Court issued a Rule to Show Cause setting a hearing for April 30, JA59. Two witnesses testified at the hearing. They were Mr. Tincher, as noted earlier, and Danielle Boyd who is general counsel for the West Virginia Lottery Commission and served as a panel member considering the bid protest.

Each witness testified about the mandatory specifications and of Smith's failure to comply with the requirements of those specifications, JA225, 242. Ms. Boyd testified as to the importance of the mandatory requirements:

“If there is anything that I can say is instilled and hammered into us at the state agency as a pillar of West Virginia purchasing, that would be a mandatory is mandatory, and use of the word shall, must or will, you know denotes just that. It's a mandatory requirements that cannot be waived. I believe it even is stated that way, in the purchasing handbook,” JA242.

Ms. Boyd also testified that while the Lottery Commission did not actually call the references, they did speak to the project architect about Wiseman's work and that those who were doing the review were familiar with the projects Wiseman named, JA252-254. She testified that the architect had indicated to her that both Wiseman and Smith were qualified in his view, JA254. The call to the architect about those references was made before litigation and during the review process, JA255.

“Q. So, in fact, it was used, that is the references.

A. Yes. It was used to verify compliance with all mandatory requirements, and again, you know, we spoke to the architect who corroborated their familiarity with Wiseman’s work,” Id.

On May 4, 2015 the Circuit Court through her law clerk notified counsel that the Court had made its decision in favor of Smith and directed Smith’s counsel to prepare and submit an order, JA281. An Order was submitted, JA283, objections to the proposed order were made JA295, 301 and the State Defendant/Respondents filed a Motion for Reconsideration, JA321. In the motion the State asked that the Court order that the Lottery contract be rebid.

On June 22 the Court entered its order which is under appeal. In the order the Court finds that:

“the State Defendants have engaged in a decision making process that has no rational basis in fact, and is, therefore contrary to the laws of this State,” JA3.

More particularly, the Court reached the following conclusions:

“In considering the Ginsberg factors, this Court, (as previously indicated to the parties after hearing testimony), does not find fraud or collusion on the part of the Defendants; however, the State Defendants have failed to take any responsibility for the fact that they created a “requirement” in the bid solicitation documents that has no rational explanation and no form for such information was provided in the mandatory bid documents for the vendors to properly complete. The only basis given for the “reference” requirement is that it was “mandatory” and that “shall” means “shall”.

The Legislature has not statutorily authorized, nor has Purchasing promulgated rules, under which references are to be sought or utilized in the evaluation of competitive bidding on construction projects. Cf., W.Va. Code §§5A-3-3 to 5; CSR §§148-1-1, et seq. There is no mention of “references” in the “Vendor Procurement

Guide” (September 2014), “Agency Master Terms and Conditions” or AIA A101-2007 and A201-2007 mentioned therein (4/13/2015), or “Purchasing Master Terms and Conditions” (4/13/2015), each published on Purchasing’s website.

It is fundamentally unfair for State agencies to pit qualified, sophisticated well-established businesses against one another to argue about the purpose of language in bid documents that no one in charge can explain where the language came from or why it was there or how vendors were supposed to furnish it, and even upon the view of bids, was never utilized or relied upon. It is indeed this conduct that is shocking to the conscience of the Court”, JA12.

The Court further concluded that Mr. Tinchler should have waived the requirement for providing three references, JA13. In sum the Court held that the:

“State Defendant’s decision to disqualify MCS and to avoid the contract to Wiseman is completely irrational and has no support in the statutory law, the enacted code of the state rules or any precedent in any state and federal court,” Id., ¶ 15.

#### **V. Summary of Argument**

The Circuit Court erred in concluding that the State agencies acted outside of their wide discretion and in a manner which shocks the conscience. The actions of these officials was both rational and in conformity with the law.

#### **VI. Statement Regarding Oral Argument and Decision**

Counsel submits that this case falls within Rule 19(a) of the Rules of Appellate Procedure. The Circuit Court has misapplied settled law(a)(1) and has entered a judgment which is contrary to the weight of the evidence(a)(3). Due to the need for expedited relief a memorandum decision would be appropriate.

**VII.**  
**Argument**

**A.**

**The Circuit Court Arrived At A Decision Which Is Based Upon A  
Clearly Erroneous Interpretation Of The Law And A Clearly  
Erroneous Application Of The Law To The Facts.**

**Standard of Review**

Challenges to findings and rulings by a Circuit Court are subject to a two-pronged deferential standard of review. Findings of fact are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review, State v. Elswick, 225 W.Va. 285, 693 S.E. 2d 38 (2010).

**The Threshold Disagreement**

The differences between positions of the parties can be summed up quite simply. The bid protestor Smith successfully argued below that it can prevail by showing fraud, collusion or obviously wrong decision. Further, Smith successfully argued that the procurement process is subject to rationality, JA183. The State asserted that the award was made to Wiseman and not to Smith because Smith failed to meet a mandatory condition or specification that was set out in the bid documents, JA192-193, 242. The State agency arrived at its decision after conducting a thorough review of the documents submitted by both Wiseman and Smith.

**The Applicable Law**

The decision of State ex rel. E.D.S. Federal v. Ginsberg, 163 W.Va. 647, 259 S.E. 2d 618 (1979) must be considered and applied. That decision defines the procedure which was to be employed below. It also sets out in its syllabus very specific rules which shall be followed when

a Court is considering a case such as this one. First Ginsberg vests wide discretion in the public officials when awarding a contract to the lowest responsible bidder. Second, the agency is cloaked with the heavy presumption that the agency has properly discharged its duties and exercised its discretionary powers in a proper and lawful manner. Next, to be successful the challenger (in this case Smith) has to show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience, Ginsberg syl. pt. 3.

Ginsberg held in the body of the opinion that:

- Fraud is always grounds for mandamus, 259 S.E. 2d at 625; and
- if a contractor submits a low responsible bid which is rejected by reason of an outrageous abuse of discretion, the contractor has grounds for relief, p. 626.

In dicta found in the opinion the Court in Ginsberg noted that the State is not required to accept the lowest bid if the bidder is not “responsible.” Further, the Court stated that courts should not guarantee any particular result, but rather only the rationality of the process by which the results were determined and the fidelity with which the contracting authority is following the statutory directives, Id.

At the center of this appeal are the conclusions of law contained in paragraphs 6, 7, 8, 12, 15 and 16, JA11-13. In its conclusions the Court found that by awarding the job to Wiseman the State Respondents arrived at a decision that “is completely irrational and has no support in the statutory law, the enacted code of the state rules or any precedent in any state or federal court,” JA13, paragraph 15. The Circuit Court did thereby elevate the dicta contained in Ginsberg above the Ginsberg Court’s firmly stated holdings. After noting what Ginsberg held as to the required burden of proof, JA11 paragraph 4, the Circuit Court went on to erroneously apply that burden to

the facts submitted. Significantly the Court stated:

*“In considering the Ginsberg factors, this Court (as previously indicated to the parties after hearing testimony), *does not find fraud or collusion* on the part of the Defendants; *however, the State Defendants have failed to take any responsibility for the fact that they created a “requirement” in the bid solicitation documents that has no rational explanation* and no form for such information was provided in the mandatory bid documents for the vendors to properly complete. The only basis given for the “reference” requirement is that it was “mandatory” and that “shall” means “shall”, JA12, paragraph 8. (Italics Added)*

Later the Circuit Court concluded that:

*“Its fundamentally unfair for State agencies to pit qualified, sophisticated well-established businesses against one another to argue about the purpose of language in bid documents that no one in charge can explain where the language came from or why it was there or how vendors were supposed to furnish it, and even upon the review of bids, was never utilized or relied upon. It is indeed this conduct that is shocking to the conscience of the Court, paragraph 10.”*

(1)

**The Conduct Condemned By The Circuit Court Does Not Rise To The Level Which Shocks The Conscience.**

The meaning of the phrase “shocks the conscience” has been developed by court decisions reached in different contexts. It has been used as an equitable standard in gauging whether (1) state action amounts to a violation of a person’s substantive due process rights, (2) a jury’s award is excessive (or too small), (3) a fine, jail term, or other penalty is disproportion to the crime, (4) a contract is unconscionable, Black’s Law Dictionary (9<sup>th</sup> ed. 2009).

One of the earliest West Virginia decisions to use the language “shocks the conscience” was Deem v. Phillips, 5 W.Va. 168 (1872). There the heirs of one Deem sued over a contract under which the deceased had agreed to deed all of his real property in exchange for a

commitment that the grantee would care for the grantor all the rest of his life. Testimony indicated that the grantor was old and very sick when he entered into the transaction. His property was said to be worth \$6000. It was conveyed for \$1. Evidence indicated that parts of the grantor's documents were left blank "to be filled in later" and that the document was altered after its acknowledgment. The Court found that no evidence established that the grantor ever saw the deed after it was altered. The Court stated that:

"It has been said that to induce a court of equity to annul a deed or contract on account of inadequacy of consideration, it must be so gross that upon first blush it 'shocks the conscience' and produces an exclamation of surprise and reprobation in indifferent persons, 5 W.Va. At 181.

The Court noted that the grantor was of extreme old age, physically and mentally impaired by age and disease, tending strongly to mental and bodily imbecility. The relief prayed for by Petitioners was granted.

In 1948 this Court ruled that taking one's land without notice violates due process of law.

The State Auditor brought the suit to take the land and also accepted service of the summons.

"An official who instigates a suit, and whose duty it is to collect the money claimed therein, cannot be the real Plaintiff, and at the same time the representation, agent and attorney in fact of the Defendant. Such a proceeding *shocks the conscience*, and is contrary to all rules of fairness and far beneath the standard of conduct which a sovereign state should set up and follow in dealing with its citizens," 131 W.Va. At 801.

Later decisions decided by this Court have equated shocking the conscience with the presumption of fraud, Koay v. Koay, 178 W.Va. 280, 359 S.E. 2d 113(1987). Koay considered a judicial sale which was examined for inadequacy of price. In the case of Benavides v. Shenandoah Federal Savings Bank, 189 W.Va. 590, 433 S.E. 2d 590 (1993) this Court decided

that the rejection of a \$75,000 upset bid in a public sale of a home for \$65,000 was not so great as to shock the conscience, syl. pt. 2. The Benavides' home had been recently valued at \$136,500. In Smith v. Rusmisell, 205 W.Va. 261, 517 S.E. 2d 494 (1999) the question involved a property which sold at a partition sale for \$375,000. Several days later an upset bid of \$412,500 was made. The lower court ruled that the \$375,000 was grossly inadequate. This Court reversed, citing Koay and Benavides. The Court held that:

“. . . mere inadequacy of price, unless the price is so inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake. . .”

should not cause the public sale to be set aside, 517 S.E. 2d at 500. Again shocking the conscience was equated with an act of fraud.

The “shock the conscience” test has also been used by Courts when considering whether a jury’s verdict should be set aside as being either excessive or inadequate. In Downer v. CSX Transportation, Inc. 256 Va. 590, 507 S.E. 2d 612 (1998) the Supreme Court of Virginia considered the inadequacy of a \$5000 verdict which was reduced by an earlier settlement of \$5000 in the case of an injured worker who had been overcome by a noxious chemical which he was handling. Mr. Downer had been twice hospitalized for a total of ten days, was confined to his home for a month, and lost seventeen days of work. In affirming the jury verdict the Court stated:

“We have repeatedly held that a jury’s award of damages may not be set aside by a trial court as inadequate or excessive unless the damages are so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by passion or prejudice or has in some way misconceived or misinterpreted the facts or the law which should guide them to a just conclusion,” 507 S.E. 2d at 614.

The “shock the conscience” standard is also used in civil rights actions instituted under 42 U.S.C. §1983, Daniels v. Williams, 474 U.S. 327 (1986). The concept is said to point clearly away from liability or clearly toward it only at the ends of tort law’s culpability spectrum. As stated in Daniels v. Williams “conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to arise to the conscience-shocking level,” 474 U.S. at 331. The Supreme Court later held that to result in liability as arbitrary conduct which shocks the conscience requires a purpose to cause harm unrelated to the legitimate object of the action taken, County of Sacramento v. Lewis, 523 U.S. 833 (1998). Courts have held that an assault and battery by a policeman does not shock the conscience, Busch v. City of Anton, Iowa, 173 F.Supp 2d 876 (N.D. IA 2001) and racial slurs and animosity towards this Plaintiffs will not be conscience shocking sufficient when the government acts with a legitimate interest in mind, Aardvark Childcare and Learning Center, Inc. v. Township of Concord, 401 F. Supp 2d 427 (E.D. PA 2005). Only the most egregious official conduct subjects the officials to liability under this conscience shocking standard, Magwood v. French, 478 F. Supp 2d 827 (W.D. PA 2007).

The Circuit Court in its decision below found no evidence of fraud or collusion. In fact, a careful review of Smith’s proposed Judgement Order as submitted when the Court first announced its decision indicates that the order contained no mention whatsoever of “shock the conscience” though such is required by Ginsberg, JA283-293. Both the State and the undersigned on behalf of Wiseman filed motions which questioned and challenged this omission and the decision, JA297 paragraph 5, and JA302 paragraph 4. Almost six weeks later the Circuit Court entered its final order which added the omitted conclusion in paragraph 10, JA12. It is

submitted that the finding of shocking the conscience as added appears as an afterthought which is not supported by the reasons given by the Court.

Paragraph 10 of the Court's Conclusions of Law states that it is "fundamentally unfair" for the agency (here the Departments of Administration and the Lottery Commission) (1) to pit businesses against one another (2) to be unable to explain the source of language found in the bid documents (3) or to tell vendors how to furnish the information requested (here the 3 references) and (4) not to rely on the information. Considering what behavior other courts have labeled as shocking the conscience the above simply does not measure up. There is no fraud involved. There is no collusion. The language concerning identifying references had a legitimate and good governmental purpose intending as it obviously did to help assure that a qualified contractor for the job be selected. The failure to first catch the error that Smith had omitted the required information was reasonably explained at the hearing as being simply an oversight, JA165, 241. It is therefore plain that the mandatory requirement here had a legitimate object and that the State officials involved possessed no animus towards Smith. The officials' action were totally devoid of any purpose to cause harm to Smith. Witness Tincher explained that "we had to make a difficult decision" about a failure to meet a mandatory requirement JA192. This scenario reflects an agency which discharged its duties and exercised its wide discretion in a proper and lawful manner.

(2)

**The Review Conducted By The State Agencies Was  
Rational And Promotes Certainty In The Bid Process.**

In its final Judgment Order the Circuit Court pointedly stated that the Court had "proceeded cautiously" to determine whether its initial decision was correct, JA3. In six different

paragraphs the Court announced or referred to conclusions concerning rationality. Essentially the Court found that in the Court's opinion the State officials acted irrationally when they awarded the bid to Wiseman over Smith. Basically the Court was saying to those at Purchasing and the Lottery that requiring bidders to adhere to the mandatory bid requirements found in the bid documents as they had been taught to do is not rational. It is difficult to interpret this decision any other way than that the Court was substituting its personal view for the views of those parties at the State agencies who are vested with the wide discretion which allows them to make this decision. As such the decision below violates Ginsberg, syllabus points 2 and 3.

To be "rational" is to be sensible, having reason or understanding, Merriam-Webster, [www.merriamwebster.com](http://www.merriamwebster.com); Webster's New World Dictionary (1995). When the testimony of Danielle Boyd and David Tincher as provided on April 30, 2015 is considered there is nothing irrational about their decision or their process used in reaching the decision. They started with a mandatory requirement which all bidders signed off on. They considered the implications of the failure to comply in view of the history which had been drilled into them that "mandatory is a mandatory." The process of their review included meetings, contact with the project architect and yes considering the prior similar work of Wiseman as contained in their submissions of 3 references as is plainly required under paragraph 1.07 Qualification Statement in the bid documents which all bidders had agreed to.

Ginsberg concludes that:

"since great discretion is reposed in the contracting authority by statute, the courts should not guarantee any particular result, but rather only the rationality of the process by which results are determined." S.E. 2d at 626.

In this case the rationality of the process was explained by Boyd and Tincher. Their explanation was reasonable and consistent with the mandatory requirements contained in the bidding process. That process assures consistency - you as a bidder must adhere to the mandatory requirements. If the bidder does not adhere the bidder can reasonably expect to be disqualified when the bids are reviewed. The Circuit Court's decision in this case, if upheld, raises the specter of uncertainty in the process which is the opposite of the Court's admonition in Ginsberg.

(3)

**The Decision Of The State Officials Is Consistent With The Law.**

The Circuit Court concluded that not only was the decision to disqualify Smith "completely irrational" but also without any legal authority, JA13 paragraph 15. On the contrary W.Va. Code §5-22-1(g) states:

"The contracting public entity may not award the contract to a bidder which fails to meet the minimum requirements set out in this section. As to a prospective low bidder which the contracting public entity determines not to have met one or more of the requirements of this section or other requirements as determined by the public entity in the written bid solicitation, prior to the time a contract award is made, the contracting public entity shall document in writing and in reasonable detail the basis for the determination and shall place the writing and in reasonable detail the basis for the determination and shall place the writing in the bid file. After the award of a bid under this section, the bid file fo the contracting public agency and all bids submitted in response to the bid solicitation shall be open and available for public inspection."  
(Emphasis Added).

This statute governs government construction contracts. To conclude as the Court below has that the agency decision was without any legal authority is to deny the obvious. The decision reached by the agency was well within their authority and was consistent with prior practice.

Beyond the above statutory authority the regulations for the Department of Administration Purchasing Division state that the Director (Mr. Tincher) shall:

“Accept or reject any and all bids in whole or in part,” 148 CSR-1-4.5

and

“Apply and enforce standard specifications,” 148 CSR-1-4.7.

Chapter 5A of the Code also supports the Director’s decision. Chapter 5A, Article 3, Section 11( c ) and (e) state the following in their relevant parts:

“( c ) Bids shall be based on the written specifications in the advertised bid request and may not be altered or withdrawn after the appointed hour for the opening of the bids.”

and

“(e) All open market orders, purchases based on advertised bid requests or contracts made by the director or by a state department shall be awarded to the lowest responsible bidder or bidders, taking into consideration the qualities of the commodities or services to be supplied, their conformity with specifications, their suitability to the requirements of the government, the delivery terms and, . . .” Any or all bids may be rejected.” (Emphasis Added).

Considering legal precedent Wiseman submits that what the State officials did is consistent with the holding about wide discretion in Ginsberg. The Circuit Court in its decision cites the case of Mid Atlantic Storage System, Inc. v. Town of Milton, 903 F. Supp 995 (S.D. W.Va. 1995). In that decision the District Court ordered the town either to award the contract based on the original specifications or to reject all bids. The District Court relied in part on the case of Pioneer Co. v. Hutchinson, 159 W.Va. 276, 220 S.E. 2d 894 (1975) while noting that the decision had been overruled in part in Ginsberg. Pioneer like Ginsberg fully supports the actions

of the State officials in this case. In fact, Pioneer syllabus points 5 and 6 reads the same as Ginsberg with this small exception. In Pioneer syllabus point 5 this Court held:

“A Court will not ordinarily interfere with the action of a public officer or Tribunal clothed with discretion, in the absence of a clear showing of fraud, collusion or *palpable abuse of discretion*.”

In the case sub judice there is no palpable abuse of discretion. On the contrary the State officials acted within their discretion. Finally, unlike the MidAtlantic matter the State agency here did not direct re-bidding and did not take any action or make any decision in response to the threat of litigation. In fact if anything can be gleaned from events is that the State’s decision was made without any concern about the threat of litigation although Smith’s counsel wrote to these agencies and Wiseman on April 7 that:

“Smith reserves the right to seek appropriate judicial relief pending and upon disposition of its protest,” JA88.

Accordingly, MidAtlantic does not require a different result about the actions of these agencies and actually contains authority which fully supports the agency actions.

### Conclusion

For the foregoing reasons the decision of the Circuit Court of Kanawha County should be reversed and judgment entered for this Appellant.



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No. 15-0635

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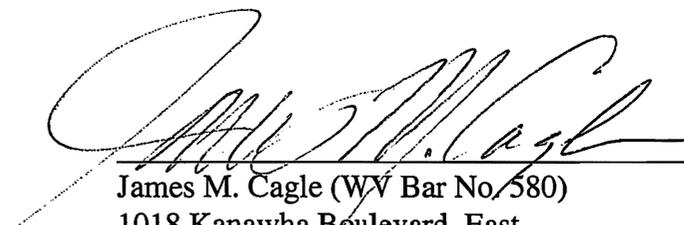
JOHN C. MUSGRAVE, Director of the West Virginia Lottery; JASON PIZATELLA,

Cabinet Secretary of the Department of Administration; and ROBERT S. KISS,

Cabinet Secretary of the Department of Revenue, Defendants Below, Respondents.

**CERTIFICATE OF SERVICE**

The undersigned, Counsel for the Appellant Wiseman Construction Company, Inc., does hereby certify that a true and correct copy of the *Petitioner's Brief* was served via e-mail and hand delivery to John P. Melick, Esq., Kelli D. Talbott, Senior Deputy Attorney General and Greg Foster, Assistant Attorney General, on this the 20<sup>th</sup> day of July, 2015.



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