

Case No. 19-0754

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, ex rel.
ADAM HOLLEY, Acting Commissioner,
West Virginia Division of Motor Vehicles,

Petitioner,

v.

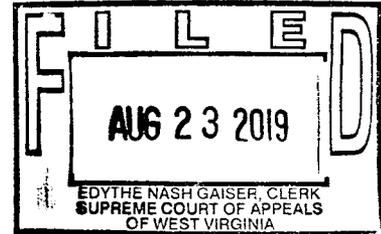
WILLIAM S. THOMPSON, Judge of the
Circuit Court of Boone County,

Respondent,

and

DYLAN PRICE,

Party in Interest.



PETITION FOR WRIT OF PROHIBITION

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Comes now Adam Holley (“Petitioner”), Acting Commissioner of the West Virginia Division of Motor Vehicles (“DMV”), by and through the undersigned counsel, and hereby submits the instant *Petition for Writ of Prohibition* pursuant to Revised Rule of Appellate Procedure 16 for the reasons that follow.

I. QUESTIONS PRESENTED

1. May a circuit court enter and *ex parte* order granting a stay of an *Order of Revocation* issued by the Commissioner of the DMV?
2. In an appeal of an order of an administrative license revocation, may a circuit court order the opposing party to prepare and file the administrative record of the tribunal with the circuit court?

II. STATEMENT OF THE CASE

The DMV is a state agency with responsibility for, *inter alia*, enforcing statutory provisions relating to the privilege to drive a motor vehicle in West Virginia. W. Va. Code §§ 17A-2-1 (1951), 17B-3-1 (1999) *et seq.* The Petitioner is the executive officer of the DMV. As such, the Petitioner is an officer of the State of West Virginia who is appointed by, and serves at the will and pleasure of the Governor of West Virginia. W. Va. Code § 17A-2-2 (1951). The Petitioner appears in his official capacity as the executive officer of the DMV.

On May 27, 2018, Dylan Price drove under the influence (“DUI”) of alcohol, controlled substances, and/or drugs and crashed his motor vehicle in Boone County, West Virginia. (App¹. at P. 15.) The passenger of his vehicle died as a result of crash. *Id.* On May 31, 2017, the Petitioner herein issued an *Order of Revocation* revoking the privilege of Mr. Price to drive in West Virginia because he was DUI and caused the death of another person while acting in reckless disregard of the safety of other people. (App. at P. 14 .) On July 5, 2018, Mr. Price, by counsel, appealed the license

¹ App. refers to the *Appendix* filed contemporaneously with the instant petition.

revocation to the Office of Administrative Hearings (“OAH”) (App. at PP. 19-21), a separate operating agency within the Department of Transportation, which has jurisdiction to hear and determine appeals of orders of the Commissioner of the DMV revoking a driver’s license for DUI. W. Va. Code §§ 17C-5C-1 (2010), 17C-5C-3(3) (2010). On July 13, 2018, the OAH sent a letter to Mr. Price’s counsel stating that the request for administrative hearing was untimely filed. (App. at P. 22.) The OAH returned Mr. Price’s *Hearing Request* and docketing fee. *Id.*

On August 16, 2018, Mr. Price, through counsel, filed a *Petition for Review of Administrative Order* with the Circuit Court of Boone County. (App. at PP. 2-5.) Also on August 16, 2018, the Honorable William Thompson entered an *ex parte Order Filing Petition for Review* wherein the circuit court ordered that Mr. Price’s driving privileges “be temporarily reinstated pending the outcome of this petition” and ordered the Petitioner to provide the administrative record to the circuit court within 30 days of receipt of the circuit court’s order. (App. at PP. 6-7.) On August 30, 2018, the Petitioner filed a *Notice of Special Limited Appearance; Motion to Dismiss for Lack of Subject Matter Jurisdiction, Venue, and Failure to Join a Party; and Request for Attorney Fees and Costs*. (App. at PP. 8-23.) On August 30, 2018, Petitioner also filed a *Notice of Hearing* on its motion to dismiss.

On November 14, 2018, the parties appeared before the Circuit Court of Boone County and presented argument on the Petitioner’s motion to dismiss. (App. at P. 26.) The Court held the matter in abeyance. On November 26, 2018, the Petitioner filed a proposed *Order Granting Motion to Dismiss for Lack of Subject Matter Jurisdiction, Venue, and Failure to Join a Party; and Request for Attorney Fees and Costs*. (App. at PP. 26-33.) On February 6, 2019, the Petitioner filed a *Motion to Enter Final Order* with the circuit court below. (App. at PP. 34-37.) The Circuit Court of Boone

County has taken no further action in this matter. (App. at P. 1.)

III. SUMMARY OF ARGUMENT

The extraordinary remedy of prohibition is sought herein on the grounds that the circuit court of Boone County not only lacks jurisdiction to entertain Mr. Price's petition below but that the circuit court has exceeded its jurisdiction in granting an *ex parte* open-ended order staying the license revocation of Mr. Price and requiring the Petitioner to produce the administrative record in the possession of the OAH. These matters may be resolved only by issuance of a writ in the present case.

First, because Mr. Price did not have an administrative hearing before the OAH due to his untimely request for an appeal, the circuit court lacked jurisdiction to entertain a petition for judicial review and to grant any relief to Mr. Price. Further, the stay of revocation has been granted without the procedure required by W. Va. Code §17C-5A-2(s) (2015), namely, a motion, a hearing where evidence is adduced, and findings by the circuit court that there is substantial probability that Mr. Price shall prevail upon the merits and will suffer irreparable harm if the order of revocation is not stayed. If the circuit court had jurisdiction to hear the matter, which it did not, the court was required by W. Va. Code §17C-5A-2(s) (2015) to limit the stay to 150 days. Finally, the order requiring the DMV to produce the administrative record of the OAH violates W. Va. Code §17C-5A-2(s) (2015) which commands that the "party filing the appeal shall pay the *Office of Administrative Hearings* for the production and transmission of the certified file copy and the hearing transcript to the court." [Emphasis added.] Because there was no contested case before the OAH, the circuit court lacked subject matter jurisdiction to enter a stay order. Assuming, *arguendo*, that the circuit court had jurisdiction over the matter below, Judge Thompson exceeded his legitimate authority in granting an *ex parte* open-ended stay order in violation of the clear requirements set forth in W. Va. Code

§17C-5A-2(s) and applicable case law, *infra*.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The DMV submits that review of the record should allow this Court to dispose of the pending case without either issuance of a Rule or oral argument. However, if this Court schedules oral argument, the DMV submits that the argument should proceed under Rule 19 as this matter involves assignments of error in the application of settled law; an unsustainable exercise of discretion where the law governing that discretion is settled; and a narrow issue of law.

V. ARGUMENT

A. *Standard of Review*

“Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari. Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).” Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).” Syl. Pt. 1, *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 655 S.E.2d 137 (2007) (per curiam).

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order

is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl., Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). *See also*, Syl. Pt. 1, *W. Va. Div. of Motor Vehicles v. Swope*, 230 W. Va. 750, 742 S.E.2d 438 (2013).

B. *Prohibition is the Only Remedy to Correct a Clear Legal Error.*

Pursuant to W. Va. Code §53-1-1 (1923), a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." In that regard, a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers. *See, State ex el. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 602 S.E.2d 542 (2004).

In the instant matter, because Mr. Price did not request an administrative hearing in a timely manner, there was no final order by the OAH. Accordingly, there was no contested matter pursuant to the Circuit Court of Boone County lacked subject matter jurisdiction to hear Mr. Price's petition for judicial review. Moreover, Judge Thompson exceeded any legitimate power by granting an *ex parte* stay instead of relying on evidence adduced at hearing and requiring the opposing party in this matter to produce and pay for the administrative record - both in violation of W. Va. Code § 17C-5A-2(s) (2015). In the matter *sub judice*, there is no other remedy available because the order granting a stay and ordering the DMV to produce the record is not a final, appealable order. In that regard, immediate relief from this Court is necessary to prevent an illegal stay of revocation to

continue.

C. *The Petitioner will be prejudiced in a way that is not correctable on appeal.*

“The purpose of this State's administrative driver's license revocation procedures is to protect innocent persons by removing intoxicated drivers from the public roadways as quickly as possible.” Syl. Pt. 3, *In re Petition of McKinney*, 218 W. Va. 557, 625 S.E.2d 319 (2005); Syl. Pt. 2, *Miller v. Toler*, 229 W. Va. 302, 729 S.E.2d 137 (2012); *Reed v. Conniff*, 236 W. Va. 300, 306, 779 S.E.2d 568, 574 (2015); *Reed v. Grillot*, No. 17-0691, 2019 WL 1012160, at *5 (W. Va. Mar. 4, 2019) (memorandum decision). *See also*, *Ferrell v. Cicchirillo*, No. CIV.A. 1:08CV220, 2009 WL 1468364, at *4 (N.D.W. Va. May 26, 2009) (“The State of West Virginia has found that the purpose of the State's administrative driver's license revocation proceedings is public safety.”)

As will be more fully explained below, Mr. Price filed an appeal of his administrative license revocation with the Circuit Court of Boone County and failed to notify the administrative tribunal, the OAH, to request that the administrative record be produced. Instead, the circuit court ordered the opposing party to produce a record not in its possession. If noticed correctly, the OAH is afforded 60 days to produce the administrative record pursuant to W. Va. Code § 17C-5A-2(s) (2015).² Then, after production of the administrative record and pursuant to Rule 5 of the Rules of Procedure for Administrative Appeals (2008) (“RPAA”), Mr. Price is afforded 30 days to file a brief; the DMV is afforded 30 days to file a response; and Mr. Price is afforded 15 days to file a reply. By the end of the briefing period, the 150 day stay ordered by the circuit court will have expired, yet Mr. Price will be afforded the opportunity to request an extension of the *ex parte* order granting a stay of his

² “Notwithstanding the provisions of section four, article five of said chapter, the Office of Administrative Hearings may not be compelled to transmit a certified copy of the file or the transcript of the hearing to the circuit court in less than sixty days.”

license revocation.³

Until the circuit court enters a final order, Mr. Price, an adjudicated impaired driver, will be permitted to operate a motor vehicle in this state while putting the motoring public at risk, and the DMV will continue to be prejudiced in meeting its statutory duty to remove impaired drivers from the roadway as quickly as possible.

D. *The circuit court's order is clearly erroneous as a matter of law.*

1. *The Circuit Court of Boone County lacks subject matter jurisdiction.*

The circuit court determined in its *Order Filing Petition for Review* that it has “jurisdiction over this matter pursuant to Chapter 29A-5-4 [sic] of the West Virginia Code.” (App. at P. 6.) Chapter 29A of the West Virginia Code is the *State Administrative Procedures Act*, and Article 5 addresses “contested cases.”

Appellate review of a final order of an administrative agency is limited to a “contested case.” W. Va. Code § 29A-5-4(a). West Virginia Code § 29A-1-2(b) (1998) of the APA defines “contested case” as “a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing....” The rules governing the procedures for denial, suspension, revocation or nonrenewal of driving privileges as contained in Title 91, Series 5 of the Code of State Regulations contemplate that the Commissioner must hold a hearing in a contested case before a person whose license is being revoked may seek appellate review pursuant to the APA. As there was no administrative hearing before the Division by the Commissioner, there was no “contested case” within the meaning of West Virginia Code § 29A-1-2 of the APA.

State ex rel. Miller v. Reed, 203 W. Va. 673, 683, 510 S.E.2d 507, 517 (1998).

³ “A stay or supersedeas of the order issued pursuant to W. Va. Code § 17C-5A-2(s) (2012) must contain an express provision limiting the duration to no more than 150 days, although the circuit court is not precluded from issuing consecutive stays for good cause shown.” Syllabus point 4, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013).

There was no administrative hearing before the OAH; therefore, there can be no final order or decision from which judicial review is warranted, and this matter does not fall within the statutory definition of a “contested case” as contemplated by the APA. Consequently, the circuit court was required to dismiss the matter for lack of subject matter jurisdiction.

Mr. Price was not without recourse regarding the OAH’s denial of his request for hearing. This matter is factually similar to *Miller v. Reed, supra*. There, the DMV argued that because the drivers were not properly before the circuit courts as administrative appeals, the nature of the relief requested by both parties was in the nature of a petition for a writ of mandamus, and that, as such, the respective circuit courts should have dismissed both actions for lack of jurisdiction and venue. *See, State ex rel. Miller v. Reed*, 203 W. Va. 673, 684, 510 S.E.2d 507, 518 (1998). This Court agreed.

West Virginia Code § 53–1–2 (1994) provides that “[j]urisdiction of writs of mandamus and prohibition ... shall be in the circuit court of the county in which the record or proceeding is to which the writ relates.” In both cases, the Division's records relating to driver's licenses are maintained at the State Capitol in Charleston, Kanawha County, West Virginia. There is no question that, in regard to these two cases, jurisdiction for a writ of mandamus must be brought in the Circuit Court of Kanawha County. Both actions sought to compel the Division to provide Mr. Shedd and Ms. Burrough with an administrative hearing to challenge the revocation of their driver's licenses, and such records are maintained in Kanawha County.

State ex rel. Miller v. Reed, 203 W. Va. 673, 684, 510 S.E.2d 507, 518 (1998). *See also, State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005); *Williams v. W. Virginia Div. of Motor Vehicles*, 226 W. Va. 562, 703 S.E.2d 533 (2010) (per curiam) (holding that requests for extraordinary relief against the DMV may only be brought Kanawha County and may not be heard elsewhere.)

In *Williams, supra*, this Court discussed *Stump, supra*, explaining that in *Stump*:

the Appellee had brought an action for extraordinary relief against the Commissioner of the DMV in Nicholas County. This Court compared the issues to those addressed in *Reed* and found that “the Commissioner’s or Division’s records relating to drivers’ licenses. . . are maintained at the State Capitol in Charleston, Kanawha County.” 217 W. Va. at 739, 619 S.E.2d at 252. The *Johnson* Court ultimately held that the circuit court lacked jurisdiction under the provisions of West Virginia Code § 53-1-2, requiring extraordinary writs to be brought in Kanawha County. **The Court further noted that “[e]ven if we found otherwise on the issue of the location of the relevant record herein, W. Va. Code § 14–2–2(a)(1) (1976) requires the same result (suits in which any state officer or agency is a party defendant shall to [sic] be brought and prosecuted in the Circuit Court of Kanawha County).**

226 W. Va. 562, 567, 703 S.E.2d 533, 538. [Emphasis added.] As posited by the DMV in *State ex rel. Joe Miller v. McGraw*, if Mr. Price “wished to seek further judicial action on this revocation, he would have to file a request for an extraordinary writ in the Circuit Court of Kanawha County.” *State ex rel. Joe Miller v. McGraw*, No. 12-0380, 2012 WL 3155761, at *1 (W. Va. May 30, 2012).

In sum, the instant matter is not a contested case eligible for review by the circuit court pursuant to W. Va. Code § 29A-5-4 (1998) but is in the nature of an extraordinary writ. Jurisdiction and venue for writs of mandamus and prohibition against the DMV lie only in Kanawha County. Therefore, the circuit court lacks jurisdiction to hear the matter and was required to dismiss the same.

Subject-matter jurisdiction is a threshold question for any court, *State ex rel. Orlofske v. Wheeling*, 212 W. Va. 538, 543, 575 S.E.2d 148, 153 (2002), for “[w]henver it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.” Syllabus Point 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va., 492, 211 S.E.2d 705 (1975). *See also Jarvis v. Porterfield*, 175 W. Va. 525, 528-529, 370 S.E.2d 620, 623-24 (1988) (per curiam) (“Where a trial court is without jurisdiction in a matter, it should not proceed to entertain the matter. Instead, it should dismiss it from the docket.”); *State ex rel. Shrewsberry v. Hrko*, 206 W. Va. 646, 651, 527

S.E.2d 508, 513 (1999) (per curiam) (Starcher, C.J. concurring) (“Once a court discovers it does not have subject-matter jurisdiction of a particular case, it ceases to have any power to rule and must dismiss the case.”); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”); Syllabus Points 4 and 5, *State ex rel. Dale v. Stucky*, 232 W. Va. 299, 752 S.E.2d 330 (2013) “ ‘To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.’ Syllabus Point 3, *State ex rel. Smith v. Bosworth*, 145 W. Va. 753, 117 S.E.2d 610 (1960).” Syl. Pt. 3, *Blankenship v. Estep*, 201 W. Va. 261, 496 S.E.2d 211 (1997). “ ‘Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.’ Syllabus Point 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975)” Syllabus Point 1, *Hanson v. Bd. of Educ. of the Cnty. of Mineral*, 198 W. Va. 6, 479 S.E.2d 305 (1996).).

2. Assuming, *arguendo*, that the circuit court had jurisdiction below, the order granting an *ex parte* open-ended stay of Mr. Price’s license revocation violates statutory and case law.

Judge Thompson’s order was improperly granted, in violation of W. Va. Code § 17C-5A-2(s) (2015), which provides:

the court may grant a stay or supersedeas of the order only **upon motion and hearing**, and a finding by the court upon the evidence presented, 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: Provided, That in no event shall the stay or supersedeas of the order exceed one-hundred-fifty days.

[Emphasis added.]

The circuit court's order is also in violation of this Court's determination that

[b]efore any stay may be granted in an appeal from a decision of the Commissioner of the Department of Motor Vehicles revoking a driver's license, the circuit court **must conduct a hearing** where evidence is adduced and, 'upon the evidence presented,' **must make a finding** that there is a substantial probability that the appellant will prevail upon the merits and that he will suffer irreparable harm if a stay is not granted. Syllabus Point 2, *Smith v. Bechtold*, 190 W. Va. 315, 438 S.E.2d 347 (1993).

[Emphasis added.] Syllabus Point 2, *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876, 877 (2013)⁴. This Court concluded in *Smith v. Bechtold* that “. . . if the circuit judge granted the stays without conducting evidentiary hearings and without meaningfully analyzing the evidence adduced during the hearings, he exceeded the legitimate powers granted to him under the statute.” 190 W. Va. 315, 319, 438 S.E.2d 347, 351.

It is without question that this Court requires the circuit courts to observe the requirements outlined in W. Va. Code § 17C-5A-2(s) (2015), namely: the petitioners below must file motions asking for a stay, and the circuit court must conduct an evidentiary hearing at which testimony is taken or other evidence is submitted so that a meaningful analysis of the alleged irreparable harm can be made.

Although the second part of West Virginia Code § 17C-5A-2(s), providing “the substantial probability that the appellant shall prevail on the merits,” can be satisfied by proffer and argument of counsel, a circuit court can only make a reasoned decision as to the alleged irreparable harm that a driver may suffer through the taking of evidence. We agree with the Commissioner's arguments.

...

⁴ Judge William Thompson of Boone County presided over one of the three matters consolidated in *State ex rel. Miller v. Karl*.

Fundamental fairness dictates that the Commissioner be granted an opportunity to cross-examine the driver as to irreparable harm. We believe that the Commissioner has the right to inquire further into the driver's situation and the alleged harm that will befall the driver if the license revocation is not stayed pending appeal. Once the Commissioner has had the opportunity to cross-examine the driver on these issues, the circuit court should then make the necessary factual and legal findings on the record to satisfy the requirements of the statute.

State ex rel. Miller v. Karl, 231 W. Va. 65, 69–70, 743 S.E.2d 876, 880–81 (2013).

The circuit court exceeded its legitimate authority by entering Mr. Price's proposed *Order Filing Petition for Review* without requiring Mr. Price to file a motion, without conducting a hearing upon which evidence was adduced, and without making the required findings as to irreparable harm and substantial probability of success on the merits. Even if the DMV had been provided an opportunity to respond to Mr. Price's petition prior to the Circuit Court of Boone County entering the *ex parte* order below, the circuit court was required to comply with W. Va. Code § 17C-5A-2(s) (2015).

'When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.' *United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446, 113 S.Ct. 2173, 2178, 124 L.Ed.2d 402, 412 (1993), quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152, 166 (1991).

State v. Blake, 197 W. Va. 700, 706, 478 S.E.2d 550, 556 (1996).

- 3. The circuit court exceeded its authority by ordering the DMV, the opposing party below, to prepare and file the administrative record of the OAH, the tribunal.**

In the *Order Filing Petition for Review*, the Circuit Court of Boone County ordered that "the Commission file with the Clerk of this Court a complete copy of the transcript of hearing, all exhibits in the file, and a copy of all administrative orders made by the Commissioner within 30 days after

receipt of this Order.” (App. at P. 2.) West Virginia Code § 17C-5A-2(s) (2015) is clear in its language that the “party filing the appeal shall pay the *Office of Administrative Hearings* for the production and transmission of the certified file copy and the hearing transcript to the court.”

Since June 6, 2010, the OAH is “a separate operating agency within the Department of Transportation.” W. Va. Code § 17C-5C-1(a) (2010). The OAH has jurisdiction to hear and determine all appeals outlined in W. Va. Code § 17C-5C-3 (2010). The DMV, a party to the matter before the circuit court, cannot produce the administrative record. The DMV’s record does not contain the administrative record before the OAH or a transcript of the administrative hearing. The OAH, a separate statutory agency, is the custodian of the record which Mr. Price is required to request for the circuit court’s review. *See*, W. Va. Code § 29A-5-1(a) (1998)⁵ and W. Va. Code § 29A-5-4(f) (1998).⁶

Mr. Price failed, as required by Rule 2(e)⁷ of the RPAA, to attach a certificate of service to his *Petition for Review of Administrative Order* and failed, as mandated by Rule 4(a) of the RPAA, to file a *Designation of the Record* indicating that he served the OAH with a copy of his petition.⁸ Therefore, the OAH has not been put on notice that the administrative appeal was filed or that the

⁵ “The agency shall prepare an official record, which shall include reported testimony and exhibits in each contested case, and all agency staff memoranda and data used in consideration of the case, but it shall not be necessary to transcribe the reported testimony unless required for purposes of rehearing or judicial review.”

⁶ “The review shall be conducted by the court without a jury and shall be upon the record made before the agency.”

⁷ “The certificate of service shall show proof of service on the agency whose final decision, order, rule or ruling is involved (unless the agency is the petitioner), even if the agency is not a party.”

⁸ “Upon filing of the Petition, the petitioner shall designate those parts of the record deemed material to the questions presented in the appeal, including the relevant proceedings to be transcribed, and serve notice of such designation upon all parties below.”

circuit court will require an administrative record for its review.⁹

The OAH promulgated procedural rules which address the production of the administrative record.

Upon written request of a party, the OAH will facilitate having the recording of the hearing transcribed and a copy furnished to the party requesting the hearing transcript at the expense of the requesting party. The filing of an appeal from a final order that necessitates the transcription shall constitute such a written request from the party filing the appeal. The OAH or the transcription service provider may demand prepayment of the transcription and transcript costs, including the original and copy of the transcript, from a requesting party. Upon completion of the hearing transcript, the original transcript shall be filed with the OAH and made part of the official OAH record.

The official OAH record consists of written objections, motions and responses thereto, orders, hearing notices, subpoenas, hearing exhibits, any other evidence that was considered or reviewed by the OAH when drafting the final order, the final order, and the hearing transcript, if any. The parties may file a joint designation of record that limits the record for appeal purposes. The expense of preparing such record for appeal shall be taxed as a part of the costs of the appeal.

W. Va. Code State R. §§105-1-16.1, 105-1-16.2 (2016).

Mr. Price cannot circumvent statute or rule by having the circuit court order the DMV to produce and to pay for that which he is required to request from the OAH, and the circuit court exceeded its legitimate authority in so ordering.

E. This Court must address the errors raised herein as they are subject to be oft repeated and manifests a persistent disregard of the Circuit Court of Boone County for the procedural requirements of W. Va. Code § 17C-5A-2(s) (2015).

Even if Judge Thompson issues an amended order after the filing of this instant matter, this Court must still review and determine the issues presented because they will be repeated throughout

⁹ See, W. Va. Code § 29A-5-4(f) which provides, “[t]he review shall be conducted by the court without a jury and shall be upon the record made before the agency . . .” See also, RPAA 6(a) providing, “[t]he circuit court shall only consider evidence which was made part of the record in the proceeding before the administrative agency. . .”

the State of West Virginia and by the circuit court below. As this Court has previously determined,

[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review. Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984).

State ex rel. Wooten v. Coal Mine Safety Bd. of Appeals, 226 W. Va. 508, 515, 703 S.E.2d 280, 287 (2010).

In the last month, the OAH has issued hundreds of final orders in an effort to eliminate the backlog recognized by this Court in *Reed v. Staffileno*, 239 W. Va. 538, 803 S.E.2d 508 (2017) and *Straub v. Reed*, 239 W. Va. 844, 806 S.E.2d 768 (2017). The OAH is currently issuing orders at a pace to entirely eliminate the backlog by the end of 2019. As a consequence, the number of circuit court appeals has increased significantly as impaired drivers seek to avoid safety and treatment programs, interlock restrictions and other driving consequences under the remedy created in *Staffileno, supra*, when there has been a delay in issuing a final order. It is imperative that this Court send a message to the circuit courts regarding their compliance with the existing statutory appellate procedure which is equally clear as the message sent to the OAH about issuing timely final orders.

In almost every case where a driver appeals his license revocation, the driver requests a stay hearing. Because there are 75 circuit judges conducting stay hearings, there is a possibility for 75 different interpretations of the evidentiary requirements of W. Va. Code §17C-5A-2(s) (2015); therefore, the matter will continue to be repeated as other drivers request stays of their license revocations.

In addition, the Circuit Court of Boone County has manifested a persistent disregard for the procedural requirements of W. Va. Code § 17C-5A-2(s) (2015). As previously mentioned, this Court

addressed Judge Thompson's violations of the relevant statutory requirements for granting a stay of a license revocation in *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013). Despite this Court's determination that the circuit court must hold a hearing where evidence is adduced and must make findings of fact regarding irreparable harm and probability of success on the merits, Judge Thompson entered an *ex parte* order granting a stay of the DMV's license revocation order in the instant matter. The circuit court's disregard of the statutory stay requirements and this Court's previous holdings has become a chronic problem and must be addressed again.

VII. CONCLUSION

For the reasons listed above, the Petitioner prays that this Court grant Petitioner's *Petition for Writ of Prohibition*.

Respectfully submitted,

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