

FILE COPY

FEB 26 2020

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-8142

STATE OF WEST VIRGINIA EX REL.
EVERETT FRAZIER, COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

DO NOT REMOVE
FROM FILE

Petitioner,

v.

THE HONORABLE WARREN R. MCGRAW,
IN HIS OFFICIAL CAPACITY AS JUDGE OF
THE TWENTY-SEVENTH JUDICIAL CIRCUIT, AND
DALTON WATTS,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

JANET E. JAMES
ASSISTANT ATTORNEY GENERAL
WEST VIRGINIA STATE BAR NO. 4904
DMV - OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 17200
CHARLESTON, WV 25317
(304) 558-2522
Janet.E.James@wv.gov

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 1

Summary of Argument 3

Statement Regarding Oral Argument and Decision 4

Argument 4

 I. THE CIRCUIT COURT OF WYOMING COUNTY SHOULD BE PRECLUDED
 FROM EXERCISING JURISDICTION OVER A MATTER IN WHICH
 EXTRAORDINARY RELIEF IS REQUESTED AGAINST A STATE AGENCY.
 4

 II. THE MATTER MUST BE DISMISSED FROM THE WYOMING COUNTY
 CIRCUIT COURT BECAUSE RESPONDENT WATTS FAILED TO PROVIDE
 THE DMV AND THE OAH WITH THE REQUISITE PRE-SUIT NOTIFICATION.
 11

 III. DMV IS ENTITLED TO COSTS FROM WATTS BECAUSE THE CIRCUIT
 COURT MUST DISMISS FOR LACK OF JURISDICTION. 11

Conclusion 12

TABLE OF AUTHORITIES

West Virginia Case Law

Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996)10

Blankenship v. Estep, 201 W. Va. 261, 496 S.E.2d 211 (1997)6

Commodity Futures Trading Com'n v. Schor, 478 U.S. 833 (1986)10

Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953)8,9

Dishman v. Jarrell, 165 W.Va. 709, 271 S.E.2d 348 (1980)10

Gonzalez v. Thaler 565 U.S. 134 (2012)10

Hanson v. Bd. of Educ. of the Cnty. of Mineral, 198 W. Va. 6, 479 S.E.2d 305 (1996).7

Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc., 158 W. Va. 492, 211 S.E.2d 705 (1975).6

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)9

Holley v. Feagley, 242 W. Va. 240, 834 S.E.2d 536 (2019).....5,7

Jarvis v. Porterfield, 175 W. Va. 525, 370 S.E.2d 620 (1988) (per curiam)6

James M.B. v. Carolyn M. 193 W.Va. 289, 456 S.E.2d 16 (1995).....9

Ex parte McCardle, 74 U.S. 506 (1868)6

Miller v. Moredock, 229 W. Va. 66, 726 S.E.2d 34 (2011)9

Motto v. CSX Transp., Inc., 220 W. Va. 412, 647 S.E.2d 848 (2007)11

<i>Newman v. Bailey</i> , 124 W. Va. 705, 22 S.E.2d 280 (1942).....	5
<i>Reed v. Staffileno</i> , 239 W. Va. 538, 803 S.E.2d 508 (2017).....	5
<i>State ex rel. Barden and Robeson Corp. v. Hill</i> , 208 W.Va. 163, 539 S.E.2d 106 (2000)	10
<i>State ex rel. Dale v. Stucky</i> , 232 W. Va. 299, 752 S.E.2d 330 (2013)	6
<i>State ex rel. Hoover v. Berger</i> , 199 W.Va. 12, 483 S.E.2d 12 (1996)	8,9
<i>State ex rel. Johnson v. Reed</i> , 219 W. Va. 289, 633 S.E.2d 234 (2006).	7
<i>State ex rel. Joe Miller v. McGraw</i> , No. 12-0380, 2012 WL 3155761 (W. Va. May 30, 2012) (memorandum decision).....	4,5
<i>State ex rel. Orlofske v. Wheeling</i> , 212 W. Va. 538, 575 S.E.2d 148 (2002).....	6
<i>State ex rel. Shrewsberry v. Hrko</i> , 206 W. Va. 646, 527 S.E.2d 508 (1999) (per curiam) (Starcher, C.J. concurring)	6
<i>State ex rel. Smith v. Bosworth</i> , 145 W. Va. 753, 117 S.E.2d 610 (1960).	6
<i>State ex rel. Smith v. Thornsbury</i> , 214 W. Va. 228, 588 S.E.2d 217 (2003)	10
<i>State ex rel. Stump v. Johnson</i> , 217 W. Va. 733, 619 S.E.2d 246 (2005).....	5
<i>State ex rel. Vineyard v. O'Brien</i> , 100 W. Va. 163, 130 S.E. 111 (1925)	7
<i>West Virginia Secondary School Activities Comm'n v. Wagner</i> , 143 W.Va. 508, 102 S.E.2d 901 (1958)	10
<i>Williams v. W. Virginia Div. of Motor Vehicles</i> , 226 W. Va. 562, 703 S.E.2d 533 (2010)(per curiam).....	5

Wolfe v. Shaw, 113 W.Va. 735, 169 S.E. 325
(1933).....8

W. Virginia Div. of Motor Vehicles v. Swope, 230 W. Va. 750, 742 S.E.2d 438 (2013).
.....9

U.S. Supreme Court Case Law

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003,
140 L.Ed.2d 210
(1998).....10

Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S.Ct. 3245,
92 L.Ed.2d 675
(1986).....10

West Virginia Statutes

W. Va. Code § 14-2-2.....7

W. Va. Code § 17C-5A-
1.....1

W. Va. Code § 17A-2-14

W. Va. Code § 17C-5C-1
.....5

W. Va. Code § 17C-5C-3
.....2

W. Va. Code § 17C-5C-
5.....5

W. Va. Code § 29A-5-1.....9

W. Va. Code § 29A-5-
4.....2,9

W. Va. Code § 53-1-
2.....5,7

W. Va. Code § 51-1-3.....7

W. Va. Code § 55-17-3.....11

W. Va. Code § 59-2-12.....11

Constitution

W. Va. Const. Art. VIII, § 3.....7

Rule

Rules of Appellate Procedure Rule

16.....7

QUESTIONS PRESENTED

1. **WHETHER THE CIRCUIT COURT OF WYOMING COUNTY SHOULD BE PRECLUDED FROM EXERCISING JURISDICTION OVER A MATTER IN WHICH EXTRAORDINARY RELIEF IS REQUESTED AGAINST A STATE AGENCY?**
2. **WHETHER THE MATTER MUST BE DISMISSED FROM THE CIRCUIT COURT OF WYOMING COUNTY BECAUSE RESPONDENT WATTS DID NOT FILE A PRE-SUIT NOTIFICATION?**
3. **WHETHER THE PETITIONER IS ENTITLED TO COSTS AS A RESULT OF THE CIRCUIT COURT'S LACK OF JURISDICTION?**

STATEMENT OF THE CASE

The Petitioner, Everett Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), seeks a writ of prohibition to prevent Respondent Judge McGraw from exercising jurisdiction in the matter styled *Dalton Watts v. Adam Holley, Acting Commissioner of the West Virginia Division of Motor Vehicles*, Civil Action No. 19-C-92 (Wyoming County), a matter in which extraordinary relief is sought from the Office of Administrative Hearings ("OAH"), which is not a party to the case.

This matter originated in the arrest of Respondent Watts ("Watts") for driving under the influence of alcohol, controlled substances or drugs ("DUI") on October 15, 2015. On October 27, 2015, DMV received a DUI Information Sheet from the Investigating Officer as required by W. Va. Code § 17C-5A-1(b) (2012). Appendix Record 38-49 (hereinafter, "A.R." followed by page numbers). On November 5, 2015, pursuant to W. Va. Code § 17C-5A-1(c) (2012), DMV sent Watts an *Order of Revocation* for DUI. A.R. 36.

Watts, *pro se*, timely requested a hearing from the OAH. A. R. 15. "The Office of Administrative Hearings jurisdiction to hear and determine all: ...(3) Appeals from orders of the Commissioner of the Division of Motor Vehicles pursuant to section two, article five-A, of this

chapter, revoking or suspending a license under the provisions of section one of this article or section seven, article five of chapter.” W. Va. Code § 17C-5C-3.

In a *Motion to Continue* filed with the OAH on November 16, 2017, attorney Thomas H. Evans, III appeared as counsel and represented that he had “just been retained.” A.R. 134-35. On July 18, 2019, William Elswick, counsel for the DMV before the OAH, filed a *Motion/Request for Continuance* with the OAH. A.R. 231-234. The motion was served on Attorney Evans at “thevans3@frontier.com.” A.R. 234, 238. On July 18, 2019 at 1:06 p.m., OAH Hearing Examiner Jackson emailed Attorney Evans and asked him if he had an objection to the motion for continuance. At 2:45 p.m. on July 18, 2019, Attorney Evans replied, “No objection.” A.R. 237. On July 23, 2019, Hearing Examiner Jackson entered an *Order Granting Continuance*, which continued the hearing in the present case to August 15, 2019. A.R. 236. The order was served via email to, among others, Attorney Evans at “thevans3@frontier.com.” A.R. 237.

Neither Watts nor his counsel appeared at the August 15, 2019 hearing. On August 17, 2019, the OAH issued a *Final Order* advising Watts that his failure to appear at the hearing “is construed as an implicit withdrawal of your request for a hearing as well as a waiver of your right to contest the suspension and/or revocation of your driver’s license.” A.R. 240-241.

Watts, by counsel Lela Walker, Esq., filed a *Petition* in the circuit court of Wyoming County which purported to be an appeal of the OAH’s *Final Order* pursuant to W. Va. Code § 29A-5-4. The *Petition* was filed on September 19, 2019, 31 days after entry of the OAH’s *Final Order*.

DMV filed a *Notice of Special Limited Appearance, Motion to Dismiss and Motion for Attorney Fees and Costs* on October 3, 2019. A.R. 259-263. A stay hearing was held on November

6, 2019. A.R. 267-288¹. Watts argued that he is properly bringing an appeal in Wyoming County; DMV argued that the court had no jurisdiction; and the court held it had jurisdiction over the petition and conducted a stay hearing.

An Order Granting Petitioner's Motion to Stay Suspension of Driver's License Pending Appeal was entered on November 7, 2019. That order denied the DMV's motion for dismissal. A.R. 289-291.

SUMMARY OF ARGUMENT

DMV petitions this Court to preclude Respondent Judge McGraw from exercising jurisdiction in this matter. The Administrative Procedures Act ("APA") governs jurisdiction of petitions for appeal of administrative cases, and this is not an appeal of a contested case. Watts requests, *inter alia*, that he be provided with another administrative hearing. In order to compel an agency to provide him with a hearing, he must seek relief in mandamus.

There are at least three reasons why the circuit court lacks jurisdiction. First, only the OAH, the tribunal which conducts administrative hearings following DMV orders of revocation, can grant a hearing. Watts, therefore, has failed to join an indispensable party, the OAH, in this matter. Second, extraordinary writs against state agencies can only be brought in Kanawha County. Third, Watts failed to provide DMV with pre-suit notification.

¹The transcript of the November 6, 2019 hearing contains errors in that the undersigned was alone at counsel table and was the sole attorney presenting argument for the DMV. The transcript reflects that William Elswick argued for the DMV. More significantly, much of the transcribed argument is nonsensical. The undersigned has requested an audio recording of the hearing.

Petitioner is entitled to costs and fees from Respondent Watts because of the lack of jurisdiction in Wyoming County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the facts and legal argument are adequately presented in the *Verified Petition for Writ of Prohibition* and *Appendix*, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. THE CIRCUIT COURT OF WYOMING COUNTY SHOULD BE PRECLUDED FROM EXERCISING JURISDICTION OVER A MATTER IN WHICH EXTRAORDINARY RELIEF IS REQUESTED AGAINST A STATE AGENCY.

This matter is not review of a contested case pursuant to the Administrative Procedures Act. It is, rather, a request for extraordinary relief. Therefore, the circuit court of Wyoming County lacks jurisdiction to hear the matter. This case tracks with *State ex rel. Joe Miller v. McGraw*, No. 12-0380, 2012 WL 3155761 (W. Va. May 30, 2012) (memorandum decision), except that the administrative tribunal is now the OAH, not the DMV. Actions against the OAH (from whom the *de facto* relief is sought) and the DMV must be brought only in Kanawha County.

Watts seeks to compel the OAH to provide him with another administrative hearing. Therefore, the agency against whom he should seek such relief is the OAH. “We note that Mr. Feagley brought this action against the DMV when, instead, he should have brought it against the Office of Administrative Hearings. We remind litigants that the DMV and the Office of Administrative Hearings are separate administrative agencies. *See* W. Va. Code §§ 17A-2-1 and

17C-5C-1. Under West Virginia Code § 17C-5C-5, the West Virginia Legislature transferred authority over the administrative hearing process from the DMV to the Office of Administrative Hearings. *See, Reed v. Staffileno*, 239 W. Va. 538, 541, 803 S.E.2d 508, 511 n.2 (2017).” Fn. 2, *Holley v. Feagley*, 242 W. Va. 240, 834 S.E.2d 536 (2019).

West Virginia Code § 53-1-2 [1933] states in pertinent part 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.” Requests for extraordinary relief against DMV may only be brought Kanawha County. *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); *Newman v. Bailey*, 124 W. Va. 705, 22 S.E.2d 280 (1942), and may not be heard elsewhere. In *Williams, supra*, this Court explained that in *Stump, supra*:

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.

As posited by the DMV in *State ex rel. Joe Miller v. McGraw*, if Plaintiff “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.” *Miller*, 2012 WL 3155761 at 1.

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).”

Relief in prohibition is sought through this Court’s original jurisdiction pursuant to W. Va. Code §§ 51-1-3 [1923] and 53-1-2 [1933]. The extraordinary remedy of prohibition is sought herein on the grounds that the Wyoming County circuit court erred in accepting jurisdiction of the case. The 2019 amendments to the venue statute do not affect this matter. “The Legislature has only amended the statute controlling venue for extraordinary writs; it has not amended the subject matter jurisdiction statute. A court must properly exercise jurisdiction over a matter before it can reach a determination of proper venue. As such, our precedent interpreting § 53-1-2 holding that subject matter jurisdiction over extraordinary relief petitions relating to DMV records is only proper in Kanawha County remains unaltered by the Legislature’s amendment of § 14-2-2 and guides this decision.” *Holley, supra* at 834 S.E.2d 541.

This Court has original jurisdiction in prohibition proceedings pursuant to Article VIII, § 3, of the *Constitution of West Virginia*. That jurisdiction is recognized in Rule 16 of the *Rules of Appellate Procedure* and in various statutory provisions. W. Va. Code § 51-1-3 [1923]; W. Va. Code § 53-1-2 [1933]. In considering whether to grant relief in prohibition, this Court stated in the syllabus point of *State ex rel. Vineyard v. O’Brien*, 100 W. Va. 163, 130 S.E. 111 (1925): “The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction.” Syl. pt. 1, *State ex rel. Johnson v. Reed*, 219 W. Va. 289, 633 S.E.2d 234 (2006).

In the current matter, which concerns whether the circuit court exceeded its jurisdiction, the relevant guidelines are found in *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), syllabus point 4 of which holds:

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.

DMV is mindful that relief in prohibition may not be used as a substitute for appeal. However, this Court has consistent precedent to the effect that prohibition is the appropriate remedy to prevent a court from proceeding when it lacks jurisdiction. In *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953), this Court held:

The Court, noting in its opinion in the [*Wolfe v. Shaw*, 113 W.Va. 735, 169 S.E. 325 (1933)] case that the defendant had preserved his right to raise the question on writ of error, should an adverse judgment be entered against him, nevertheless, granted it by saying: '* * * A trial as to Wolfe would be futile, because any judgment rendered against him would ultimately have to fall if challenged on a writ of error.' The basis of the action again was the lack of jurisdiction of the trial court.

138 W. Va. at 212, 75 S.E.2d at 372-73.

This Court granted relief in prohibition where a circuit court accepted an appeal which was filed out of time, before the merits of the case were adjudicated by the circuit court. *W. Virginia Div. of Motor Vehicles v. Swope*, 230 W. Va. 750, 742 S.E.2d 438 (2013). In *Swope, supra*, this Court held, “Having, thus, exceeded its jurisdiction in declaring the appeal timely, the circuit court of Mercer County is prohibited from further consideration of White’s appeal.” *Swope*, 230 W. Va. at 752, 742 S.E.2d at 440.

A writ should be issued because DMV “has no other adequate means, such as direct appeal, to obtain the desired relief.” *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. Interlocutory orders, such as the order granting a stay in which the DMV’s motion to dismiss was denied, are not subject to direct appeal. *See James M.B. v. Carolyn M.* 193 W.Va. 289, 456 S.E.2d 16 (1995); *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). Further, as the Court intimated in *Crawford v. Taylor, supra*, to proceed to resolution on the merits would be futile, because any judgment rendered would ultimately have to fall due to lack of jurisdiction.

Judicial review of an administrative order or decision concerning revocation is obtained in circuit court, and subsequently in this Court, under the Contested Cases provision of the *State Administrative Procedures Act*, W. Va. Code § 29A-5-1 [1926], *et seq.* *See, Miller v. Moredock*, 229 W. Va. 66, 726 S.E.2d 34 (2011). The relevant statute, W. Va. Code § 29A-5-4(b), provides, in part:

Proceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha county, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency....

"It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998). *See, Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996) ("a trial court cannot write its own jurisdictional ticket, but it must act within the confines of constitutional as well as statutory limits on its jurisdiction."). Subject matter jurisdiction relates to institutional concerns on the authority of the judiciary to act, concerns that the parties cannot be expected to protect. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 851 (1986). Subject matter jurisdiction "must exist as a matter of law for the court to act[.]" *State ex rel. Smith v. Thornsbury*, 214 W. Va. 228, 233, 588 S.E.2d 217, 222 (2003), and cannot be vested outside the parameters of constitution and statutes. Thus, this Court has "stated categorically that '[s]ubject matter jurisdiction may never be waived.'" *State ex rel. Barden and Robeson Corp. v. Hill*, 208 W.Va. 163, 168, 539 S.E.2d 106, 111 (2000) (quoting *Dishman v. Jarrell*, 165 W.Va. 709, 712, 271 S.E.2d 348, 350 (1980) (citing *West Virginia Secondary School Activities Comm'n v. Wagner*, 143 W.Va. 508, 102 S.E.2d 901 (1958))). *See also, Gonzalez v. Thaler* 565 U.S. 134, 141(2012) ("Subject-matter jurisdiction can never be waived or forfeited.").

DMV respectfully asks this Court to exercise its original jurisdiction over this matter and enter an order directing the Respondents to show cause why a writ of prohibition should not issue to prevent the circuit court of Wyoming County from exercising jurisdiction in *Dalton Watts v. Adam Holley, Acting Commissioner of the West Virginia Division of Motor Vehicles*, Civil Action No. 19-C-92 (Wyoming County).

II. THE MATTER MUST BE DISMISSED FROM THE WYOMING COUNTY CIRCUIT COURT BECAUSE RESPONDENT WATTS FAILED TO PROVIDE THE DMV AND THE OAH WITH THE REQUISITE PRE-SUIT NOTIFICATION.

Although Watts's petition purports to be an appeal, it is in fact a petition in mandamus to compel the OAH to give him another hearing. Watts did not provide the requisite pre-suit notification to the DMV and the OAH, an indispensable party, prior to filing his appeal. West Virginia Code § 55-17-3(a)(1) provides:

Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the attorney general written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired.²

In *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007), this Court held that compliance with the pre-suit notification provisions set forth in West Virginia Code § 55-17-3(a) is a jurisdictional pre-requisite for filing an action against a State officer or agency. "Dismissal is mandated because the plaintiffs' failure to comply with statutory notice mandates deprives the circuit court of jurisdiction over this matter." *Motto*, 220 W. Va. at 419, 647 S.E.2d at 855.

The required pre-suit notice was not provided to either the OAH or the DMV in this matter. Rather, Watts simply filed his *Petition*. Therefore, this Court lacks jurisdiction to hear this matter, and the *Petition* must be dismissed for lack of statutorily required notice.

III. DMV IS ENTITLED TO COSTS FROM WATTS BECAUSE THE CIRCUIT COURT MUST DISMISS FOR LACK OF JURISDICTION.

DMV is entitled to costs from Watts pursuant to W. Va. Code § 59-2-12, which provides, "In any instance where a case, an appeal, writ of error or supersedeas shall be dismissed for want of

² The DMV and the OAH qualify as "government agencies" under this Code provision.

jurisdiction, the court **shall** render judgment against the party who improperly invoked the jurisdiction of the court for all costs, whether accruing in the trial court or in any appellate court, which result from such wrongful invoking of the jurisdiction, provided they be otherwise properly chargeable against him.” [Emphasis added.] Inasmuch as this matter must be dismissed for lack of jurisdiction, DMV is entitled to costs resulting from this action.

This matter was dismissed by the OAH on the procedural ground that Watts did not appear for the hearing he requested. The relief sought by Watts is to have a hearing before the OAH. This would require bringing an action for extraordinary relief against the OAH in Kanawha County. Watts has not joined the appropriate party and has brought the matter in the wrong jurisdiction.

CONCLUSION

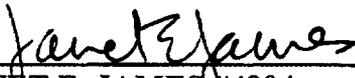
WHEREFORE, based upon the foregoing, DMV respectfully requests that a rule to show cause issue against the Respondents to demonstrate why a writ of prohibition should not be issued to prevent the Respondents from exercising jurisdiction of the matter of *Dalton Watts v. West Virginia Division of Motor Vehicles*, Civil Action No. 19-C-92 (Wyoming County), and for such other and further relief which this Court deems just and proper.

Respectfully submitted,

**EVERETT FRAZIER, COMMISSIONER OF
THE WEST VIRGINIA DIVISION OF MOTOR
VEHICLES,**

By counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**



**JANET E. JAMES #4904
ASSISTANT ATTORNEY GENERAL
DMV - Office of the Attorney General
Post Office Box 17200
Charleston, West Virginia 25317
(304)558-2522
Janet.E.James@wv.gov**