STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Green's Road & Towing Service, Inc.,
Plaintiff Below, Petitioner

vs) **No. 11-0426** (Hancock County 08-C-29)

City of Weirton,
Defendant Below, Respondent

FILED
September 23, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Green's Road & Towing Service, Inc. appeals from the circuit court's order denying petitioner's Rule 60(b)(1) motion seeking to set aside the court's order entered in favor of respondent City of Weirton ("the City") in this declaratory judgment action challenging a municipal ordinance regulating the local towing industry. Petitioner seeks a reversal of the circuit court's order and a remand for further proceedings.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On February 6, 2008, petitioner instituted this action in the circuit court seeking an injunction against the City and a declaration that the City's Ordinance No. 1554 was invalid. This Ordinance provides that any towing service dispatched within the City and through the 911 service must be equipped with certain safety equipment, commonly referred to as a "Rotator." Petitioner states that at the time it instituted this action, only one towing service dispatched through the 911 Emergency Call System had this equipment. Petitioner did not.

Petitioner alleged below that the City had previously ceded control and operation of the 911 call center to Hancock County and that under West Virginia Code §24-6-12 the Hancock County Commission—not the City—was the proper entity to establish policies regarding towing services. The City responded that West Virginia Code §24-6-12 does not exclusively empower the County Commission to establish the appropriate 911 dispatch

policy and that the County Commission has never raised any issue or objection to the City providing the policy requirements pursuant to West Virginia Code §24-6-12. Following an initial hearing, the circuit court denied the injunction.

Petitioner filed a second amended complaint to further allege that towing and road service is considered a public utility; that the intent and/or effect of Ordinance No. 1554 was to grant a de facto franchise to one of three vendors on the 911 call list at the time; and that municipalities may grant a franchise to a public utility only when done in compliance with statutory requirements[1] and the requirements of the Public Service Commission, which the City had failed to follow. Petitioner filed a motion for summary judgment seeking a ruling that no genuine issue of material fact existed that the Hancock County Commission—not the City—is charged with establishing the policy for dispatches under the emergency dispatch system in Hancock County pursuant to West Virginia Code §24-6-12(a).

On July 13, 2009, the circuit court entered an order denying petitioner's motion for summary judgment and declaring Ordinance No. 1554 to be legal and valid. The circuit court found that the City has "the plenary power and authority to make and pass all needful ordinances . . ." and the absolute authority to pass ordinances, which are consistent with the public safety. The circuit court further found that there was nothing in the record to indicate that Ordinance No. 1554 was passed for any reason other than public safety, as conceded by both parties at a hearing. The circuit court also found that the City has not "relinquished its right and duties of operating the emergency telephone system simply by creating a consolidated answering point to make service more efficient and effective."[2] Petitioner states that because this order did not mention the franchise issue, it believed that the Order was not a final, appealable order. Petitioner states that when it endeavored to set the matter for hearing, it realized that the circuit court did not believe that the matter was active. Thereafter, petitioner filed a motion for relief from judgment under Rule 60(b)(1).

On November 5, 2010, the circuit court entered an order denying petitioner's Rule 60(b)(1) motion and reiterating its earlier findings that there was no evidence that the City had exceeded the scope of its legitimate authority in enacting the towing ordinance. The court found that because Ordinance No. 1554 was passed in the interest of public safety, it is

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[1] West Virginia Code §8-31-1.

[2]The circuit court also found in its order entered on July 13, 2009, that the City, the Hancock County Commission, and the Brooke County Commission determined several years ago that it would be feasible to have a consolidated Public Safety Answering Point, which lies within Hancock County, and that since that time the Hancock County Commission has utilized the City's rules, regulations, and call list for emergency towing services.

neither arbitrary nor capricious. The circuit court added that while it did not address the franchise issue[3] by name in its July 13, 2009, order, upon reviewing that order, it was satisfied that it had addressed "the sum and substance of those allegations, and, indeed, dismissed the same."

"'A motion to vacate a judgment made pursuant to Rule 60(b), W.Va.R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.' Syllabus Point 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 1, *Builders' Service and Supply Company v. Dempsey*, 224 W.Va. 80, 680 S.E.2d 95 (2009)(per curiam). "'[A]n appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.' Syllabus Point 3, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974)." Syl. Pt. 2, *Dempsey*, 224 W.Va. 80, 680 S.E.2d 95.

Petitioner asserts that the allegations in its second amended complaint required the circuit court to address whether a franchise was granted and, if so, whether it was properly granted. Petitioner asserts that the court's July 13, 2009, order denying its motion for summary judgment does not indicate that the franchise claim was being dismissed or that the action was being removed from the court's docket, all of which effectively deprived petitioner of the right to appeal the circuit court's decision. Petitioner asserts that Rule 60(b) motions are to be liberally construed for the purpose of accomplishing justice and to achieve decisions on the merits. Petitioner adds that the circuit court abused its discretion in denying its Rule 60(b) motion, which should have been granted to allow for further proceedings on the franchise issue.

The City responds that this litigation arose because petitioner does not want to purchase the necessary safety equipment to operate a 911 towing service in the City. The City states that petitioner's Rule 60(b) motion was based upon its assertion that it did not realize the case was concluded. The City asserts that petitioner's misunderstanding cannot form the basis for this appeal because the circuit court did not abuse its discretion. The City argues that Ordinance No. 1554 is legal and valid and that there was no evidence presented that the Ordinance was passed for any reason other than the public safety of the City's residents, a fact conceded by both parties below. The City adds that while petitioner argues that the July 13, 2009, order did not resolve all issues in the matter, the July 13, 2009, order included the following statements: (1) that "[t]he City has the absolute authority to pass ordinances which are consistent with the public safety, which the court **FINDS** this ordinance

[3]The circuit court also noted that the franchise issue was not raised in petitioner's motion for summary judgment.

to be[;]" (2) that "the court **FINDS** and **CONCLUDES** that the record contains no material issue of fact indicating that the City of Weirton exceeded the scope of its legitimate authority in enacting Ordinance No. 1554[;]" and (3) that "[t]he City of Weirton Ordinance No. 1554 is hereby **DECLARED** to be **LEGAL** and **VALID**." The City argues that such language clearly reflects that petitioner's case was being dismissed and, as such, the denial of petitioner's Rule 60(b) motion was not an abuse of discretion.

Having reviewed the parties' briefs and the record designated for appeal, this Court cannot state that the circuit court abused its discretion in denying petitioner's Rule 60(b) motion. Accordingly, we affirm.

Affirmed.

ISSUED: September 23, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin