

No. 12-0527 – *State of West Virginia ex rel. Public Service Commission of West Virginia and the Wetzel County Solid Waste Authority v. Lackawanna Transport Company and Solid Waste Services, Incorporated*

BENJAMIN, Justice, dissenting:

FILED

October 23, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I dissent to the majority opinion because the petitioners have not met the necessary elements for the issuance of a writ of mandamus.

First, the petitioners have not shown a clear legal right to the relief that they seek. The majority opinion sets forth two statutes which allegedly provide the legal bases for the petitioners' requests. Specifically, W. Va. Code § 24-2-3 authorizes the Public Service Commission to limit a utility's total return to an amount which is just and reasonable. Also, W. Va. Code § 24-2-9 empowers the Commission to obtain from parties' subject to the Commission's authority information regarding rates, tolls, charges or practices in conducting their service. The majority opinion fails to explain, however, how these statutes give the Commission the power to require Solid Waste Services, an out-of-state non-utility, to disclose specific and detailed financial information for the years 2000 – 2009.

Second, the petitioners have not shown the absence of another adequate remedy. Significantly, the majority opinion acknowledges that the petitioners have another remedy available in that W. Va. Code § 24-2-10 provides a mechanism whereby

the circuit court can compel the discovery at issue to be produced at a hearing before the Commission. The majority opinion summarily concludes, however, that this remedy would not be as equally beneficial, convenient, and effective.

This Court's traditional practice is to stringently require parties seeking mandamus relief to prove the co-existence of the three elements articulated in Syllabus Point 2 of *State ex rel. Kucera v. The City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). Quite recently, this Court characterized a petition for mandamus relief as an extraordinary form of relief that is "designed to remedy miscarriages of justice and [has] consistently been used sparingly and under limited circumstances." *State ex rel. Cooper v. Tennant*, __ W. Va. __, 730 S.E.2d 368, 376 (2012). The majority opinion's departure from this standard in the instant case is troubling.

In sum, the majority opinion's liberal and overly broad use of mandamus as a mere substitute for circuit court review of a run-of-the-mill discovery dispute violates the extraordinary nature of mandamus relief, our well-settled law governing mandamus provided in *State ex rel. Kucera v. The City of Wheeling*, and this Court's traditional practice in granting mandamus relief sparingly and only under limited circumstances. For these reasons, I respectfully dissent.