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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No.: 16-0704

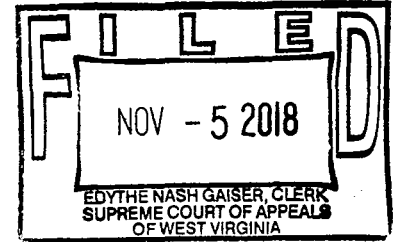
CITY OF ELKINS, Plaintiff below,
Respondent,

v.

PATRICK ELZA, Defendant below,
Petitioner.

(An appeal of a final order of the
Circuit Court of Randolph County
Civil Action No.: 17-C-144)

PETITIONER'S BRIEF



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TABLE OF CONTENTS

Table of Authorities.....	<i>iii</i>
Assignments of Error.....	1
Statement of Facts.....	1
Summary of Argument.....	6
Statement Regarding Oral Argument and Decision.....	8
Argument.....	8
1. Standard of Review.....	8
2. First Assignment of Error: The Circuit Court erred by denying the Petitioner relief on the basis that the fire fee is either a tax or an unreasonable fee.....	9
3. Second Assignment of Error: The Circuit Court erred by denying the Petitioner's motion to require the City of Elkins to provide information in discovery that would be necessary to determine whether the fire fee was an unreasonable fee.....	12
Conclusion.....	14
Certificate of Service.....	16

TABLE OF AUTHORITIES

CASES

<i>City of Fairmont v. Pitrolo Pontiac-Cadillac</i> , 172 W.Va. 505, 308 S.E.2d 527 (1983).....	10
<i>Cooper v. City of Charleston</i> , 624 S.E.2d 716, 218 W.Va. 279 (2005).....	10
<i>Davisson v. City of Bridgeport</i> , Docket No. 13-0378 (W. Va., January 15, 2014) (memorandum decision).....	9, 10, 12, 14
<i>Huntington v. Bacon</i> , 196 W.Va. 457, 473 S.E.2d 743 (1996).....	10
<i>Public Citizen, Inc. v. First Nat. Bank in Fairmont</i> , 480 S.E.2d 538, 198 W.Va. 329 (1996).....	8
<i>Shannon v. City of Hurricane</i> , Docket No. 11-0257 (W. Va., February 10, 2012) (memorandum decision).....	10
<i>State ex rel. Med. Assurance of W Va., Inc. v. Recht</i> , 213 W.Va. 457, 583 S.E.2d 80 (2003).....	8

STATUTES

W. Va. Code § 8-13-13.....	6, 9
----------------------------	------

ORDINANCES

City of Elkins Ordinance 178.....	1
City of Elkins Ordinance 195.....	1

RULES

Rule 19 of the West Virginia Rules of Appellate Procedure.....	8
Rule 26(b)(1) of the West Virginia Rules of Civil Procedure.....	13
Rule 33 of the West Virginia Rules of Civil Procedure.....	13
Rule 37(a) of the West Virginia Rules of Civil Procedure.....	13

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying the Petitioner relief from the fire fee on the basis that the fire fee was either a tax or an unreasonable fee.
2. The Circuit Court erred by denying the Petitioner's motion to require the City of Elkins to provide information in discovery that would be necessary to determine whether the fire fee was an unreasonable fee.

STATEMENT OF FACTS

In 2014, the City of Elkins passed Ordinance 178, which established a fire fee to be imposed not only on Elkins residents, but on property owners outside the city limits of Elkins who were within the “First Due” area in which the Elkins Fire Department is required to provide fire protection services. (Appendix Record Volume 1 [hereinafter “A.R.1.”] at p. 132-137.) Ordinance 178 was amended the following year by Ordinance 195. (A.R.1., at p. 141-144).

On August 25, 2017, the City of Elkins (Respondent in this appeal and plaintiff below) filed a complaint against Patrick Elza¹ (Petitioner in this appeal and defendant below) in the Magistrate Court of Randolph County, West Virginia, demanding the payment of unpaid “First Due Fire Fees.” (A.R.1., at p. 1). The Petitioner filed an answer on September 5, 2017, asserting that the fire fee was illegal, and requesting that the fee be voided. (A.R.1., at p. 3).

The Petitioner then filed a motion on September 26, 2017, requesting a variety of information from the Respondent, including information relating to the number of people charged for the fees outside and within the City of Elkins, respectively. (A.R.1., at p. 4-7). The Respondent filed a response to the Petitioner's motion on October 2, 2017, declining to provide any of the information, and asserting that the City had previously provided a variety of

¹ The Petitioner acted in a *pro se* capacity throughout the proceedings in Randolph County Magistrate and Circuit Courts.

documents to the Petitioner based on the Petitioner's FOIA requests on the topic. (A.R.1., at p. 8-10). On the 13th day of November, 2017, the Petitioner filed a motion to require the Respondent to provide the documents he had requested over the Respondent's objection. (A.R.1., at p. 11-14). The Respondent filed a motion to remove the case to Randolph County Circuit Court on November 15, 2017. (A.R.1., at p. 15-17).

Litigation concerning discovery continued in Circuit Court, where the Petitioner filed "Defendant's Second Request Motion to Produce Documents" on February 9, 2018. (A.R.1., at p. 24-26). This motion included the following specific requests:

5. An itemization of the number of houses/dwellings and businesses being assessed a fire fee outside City limits and within the first response area and an itemization of the fire fee revenue for houses/dwellings and businesses being assessed outside of City limits and within first response area for fiscal year 2016 and 2017.

An itemization of the number of houses/dwellings and businesses being assessed a fire fee inside City limits and an itemization of the fire fee revenue for houses/dwellings and business being assessed inside City limits for fiscal year 2016 and 2017.

6. Itemization of all expenses incurred by the Elkins Fire Department from providing fire protective services outside City limits (First Response Area) and an itemization of all expenses incurred from providing fire protective services within the City limits for fiscal years 2015 (before the fire fee was assessed) 2016 and 2017 and all reports of fire and non-fire incidents filed with the West Virginia State Fire Marshal's Office [...].

(A.R.1., at p. 24-25).

The Respondent filed responses to the Petitioner's first and second requests for discovery, as well as a supplemental response. (A.R.1., at p. 19-23, 27-30, 52-53). However, the Petitioner asserted that the responses were inadequate, filing, on May 1, 2018, "Defendant's Request to Make the City of Elkins Comply with My Motion to Produce Documents". (A.R.1., at p. 32-35). In this document, the Petitioner included status updates on each of his previous requests. Regarding requests number 5 and 6, the Petitioner asserted the following:

5. [...]

STATUS: I have received revenue reports for 2016 and 2017. I have not received the itemization of the "fire fee revenue" assessed to city residents and outside city residents. I am requesting the total dollar amount billed to outside city residents and the total dollar amount billed to city residents for fire fees.

[...]

6. [...]

STATUS: I have not received an itemization report for Item 6.

(A.R.1., at p. 33).

The Respondent filed a "Response to Defendant's Motion to Produce," arguing that between what had been previously produced in discovery, as well as in response to the Petitioner's FOIA requests, the Respondent had been compliant. (A.R.1., at p. 50-58). The Respondent also filed a Motion for Summary Judgment, with affidavits and a memorandum. (A.R.1., at p. 39-49). The matter came on for hearing on May 29, 2018. The Circuit Court first considered the Petitioner's "Motion to Produce." The Petitioner asserted the importance of getting the exact information about revenues and expenditures within the City versus within the First Due area, which was central to the issue of whether or not the fire fee was a lawful fee or an unlawful tax, stating, at various points during the hearing:

MR. ELZA: What Mrs. Roberts has gave me is a total. She's gave me a budget and expense which is together. So you have the \$100 and the five cents for inside and outside all in one package. So she has not clearly separated it. She hasn't separated inside or outside or business or residential. She hasn't separate it, just one lump sum is what she gave me.

(A.R.2., at p. 16).

MR. ELZA: This here – like I said we need to figure if it's a tax or a fee for what they are charging.

THE COURT: All right.

MR. ELZA: And without – I mean, the – without the information, the correct information, which I have received – some of the nine questions I have asked have been answered. And I have them here, what has been answered and what has not. But the most important is five, five six and seven. And that would prove the reasonability – a reasonable fire fee for the City of Elkins.

(A.R.2., at p. 22).

The Respondent argued that it was not required to produce documentation exactly in the format that the Petitioner required, and that it would be possible to ascertain what the Petitioner wanted to know based on the documentation that had been turned over. (A.R.2., at p. 8) The Respondent also denied that the fire fee could be construed as a tax under any circumstances, stating:

MS. ROBERTS: [...] And number two, your Honor, all the issues of due process, taxation without representation, all of that has been dealt with in the *Davisson* case and many cases that are relied on by the *Davisson* case. So whether or not you live inside the City or not – just like fee for services, if you're provided water or sewage, it is a fee for service. The fire service fee is the same thing. It is not a tax in any regard. And even if Mr. Elza believes we haven't given him the information and somehow that converts a fire service fee into a tax, that's just not how it works.

(A.R.2., at p. 25-26).

The Circuit Court denied the motion to produce at the conclusion of argument, and continued the Motion for Summary Judgment until June 8, 2018, at which time the bench trial of the case was also set. (A.R.1., at p. 68-69). The Petitioner filed a response to the Motion for Summary Judgment on June 5, 2018. (A.R.1., at p. 59-67).

The matter came on for bench trial on June 8, 2018. The Court declined to rule on the Respondent's Motion for Summary Judgment (A.R.3., at p. 3-5). Thereafter the Respondent called its witnesses: the Petitioner, Patrick Elza; Elkins Mayor, Van Broughton; Elkins Fire Chief, Tom Meader; and Elkins Treasurer, Tracy Judy. The Petitioner did not call any witnesses.

During the trial, the Petitioner's testimony established, *inter alia*, that he had a home within the City of Elkins, to which he did not object paying a fire fee, and concerning which his account was paid in full. The Petitioner further testified that he also owned a business outside of Elkins but within the First Due² area, to which this lawsuit pertained. (A.R.3., at p. 5-16.)

Mayor Broughton testified concerning the adoption and amendment of Elkins Ordinance 178, which established the fire fee in question. (A.R.3., at p. 18-23). Chief Meader testified concerning the operations and expenditures of the Elkins Fire Department, and fire service in Randolph County more generally. (A.R.3., at p. 24-69). Treasurer Judy testified about the mechanics of the collection of the fire fee, and the details of Mr. Elza's account, as well as the overall financial details of the system. (A.R.3., at p. 69-121).

On cross-examination of Ms. Judy, she testified that approximately 40% of the overall revenue generated by the fire fee came from the First Due area, with the remainder coming from within the City of Elkins. (A.R.3., at p. 112-114). The Petitioner asked Ms. Judy to describe the cost of providing service to the First Due area prior to the adoption of the fire fee ordinance; however, Ms. Judy testified that the figures were not kept separate. Although she testified that the First Due area was providing around 40% of the revenue from the fire fee, at no point was she able to testify how much of the expenditures of the fire fee funds could be attributed to the First Due area. (A.R.3., at p. 111-112). When asked whether a formula was used to determine what would be a reasonable amount to charge for fire fees in the First Due area, she testified that the fee was levied at the same rate outside the City of Elkins as within. (A.R.1., at p. 110). Additionally, she testified that while the fire department expenditures in 2015 (prior to the collection of fees from outside the City) for servicing both the City of Elkins and the First Due

² Throughout Volume 3 of the Appendix Record, which is the trial transcript, the phrase "First Due" was uniformly mistranscribed as "first new."

area was around \$400,000.00, the anticipated expenditures were over \$880,000.00 after the expansion of the fire fee. (A.R.3., at p 116-119).

Nine exhibits were introduced into evidence by the Respondent, and one by the Petitioner. (A.R.1., at p. 70-126). The Petitioner also attempted to admit a document which he obtained from the State Fire Marshall that appeared to break down, at least to an extent, services that were rendered in the City of Elkins versus the First Due area; however the Circuit Court sustained the Respondent's objection to the admission of that document for lack of foundation.³ After hearing the arguments of counsel, the Circuit Court declined to offer the Petitioner relief on the basis of the invalidity of the fire fee, and granted judgment to the Respondent. (A.R.1., at p. 127-131). It is from that order that the Petitioner appeals.

SUMMARY OF ARGUMENT

Municipalities are permitted to levy fire fees upon the designated "First Due" areas outside of their city limits without giving the First Due area residents the opportunity to vote on the issue, as long as the fee is a reasonable fee for services, and not a tax. The authority of municipalities to do so arises from W. Va. Code § 8-13-13, which permits a municipality to impose a fee upon the users of such services. Whether a fire fee of this nature is a fee, and therefore permissible to levy upon non-residents of a city, or a tax and therefore impermissible, is determined by whether the fee is for the purpose of defraying the expense of a service, or whether the fee is designed to raise revenue. Raising revenue is the purpose of taxation, which may not be imposed by a city upon those living outside the city. Additionally, to be permissible, the fee must be reasonable, meaning that it must be equitable to the persons living outside the

³ The final order in this case states that Defendant's Exhibit 1 was not admitted. (A.R.1., at p. 127). This is incorrect; the Petitioner successfully entered his Exhibit 1 into evidence during the cross-examination of Tracy Judy, and is included in the Appendix Record (A.R.1., at p. 126; A.R.3., at p. 118-119). It was the document that the Petitioner attempted to submit during closing argument that was not admitted, and which is not part of the record of this case.

municipality, and calculated to defray the expense of providing the fire protection service.

In this case, the Petitioner argues that the Circuit Court erred by finding the fee reasonable based on the evidence presented at trial, and furthermore, that the Circuit Court erred by denying the Petitioner's discovery request that was specifically calculated to provide information necessary to determine whether or not the fee was reasonable. The record at trial indicates that prior to the imposition of the fire fee upon the First Due area, the City of Elkins was spending in the ballpark of \$400,000.00 to provide fire protection service in both its own city limits, as well as the First Due area. However, following the increase in funds enabled by the First Due fire fee, the budget approximately doubled. This is indicative that the funds generated by the new fee were not simply defraying the cost of providing fire protection service, but were actually a brand new source of revenue, i.e., a tax.

The Petitioner requested information repeatedly, both in writing, and on the record, designed to provide greater insight into whether the fee, as imposed, was equitable to the residents of the First Due area. He specifically requested a breakdown in expenditures that would indicate how much money was being spent on fire services in the first due area, versus how much was being spent within the City of Elkins. The Respondent, and the Circuit Court, repeatedly rebuffed his efforts to obtain this information that bore the most relevance to his defense. Trial testimony indicated that First Due area fee payers were providing about 40% of the total funds raised by the fire fee. The Petitioner had a right to this information, which was entirely within the legitimate scope of discovery, and which was repeatedly requested with specificity. It was error for the Circuit Court to deny the Petitioner's efforts to compel the Respondent to provide a breakdown in expenditures between the City of Elkins and the First Due area.

The Petitioner requests that this Court reverse the Circuit Court, and remand for entry of judgment for the Petitioner, on the basis that the fire fee is, under these specific facts, a tax, and because the City may not assess a tax against property outside its borders. In the alternative, the Petitioner requests that this Court remand this matter for the entry of an order compelling the Respondent to provide a breakdown in respective expenditures for the City of Elkins and the First Due area, following which evidence may be reopened for the Circuit Court to consider the issues of whether the fire fee is a tax or a fee, and if it is a fee, whether it is a reasonable one.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this matter is appropriate for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, because the case involves the application of settled law, insufficient evidence, and a result against the weight of the evidence. The Petitioner asserts that this matter should be disposed of by signed opinion.

ARGUMENT

1. Standard of Review

Concerning the Petitioner's first assignment of error, this Court has described the applicable standard of review for a bench trial as follows, in Syllabus Point 1 of *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 480 S.E.2d 538, 198 W.Va. 329 (1996):

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.

Additionally, the standard of review of a trial court's discovery orders, relevant to the Petitioner's second assignment of error, is described in Syllabus Point 5 of *State ex rel. Med. Assurance of W Va., Inc. v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003):

A circuit court's ruling on discovery requests is reviewed for an abuse of discretion standard; but, where a circuit court's ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court's procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard.

2. First Assignment of Error: The Circuit Court erred by denying the Petitioner relief on the basis that the fire fee is either a tax or an unreasonable fee.

This Court has previously dealt with a similar dispute arising from First Due fire fees collected by the City of Bridgeport. In *Davisson v. City of Bridgeport*, Docket No. 13-0378 (W. Va., January 15, 2014) (memorandum decision), this Court analyzed three questions:

(1) whether imposition of the fire service fee violated petitioners' right to equal protection and due process under the state and federal constitutions because they could not vote on the charge or for members of city council; (2) whether the charge is an impermissible "tax" as opposed to a permissible "reasonable fee;" and (3) whether West Virginia Code § 8-13-13 permits a municipality to levy a fire service fee on residents outside the jurisdiction of the municipality.

Id., at p. 3-4.

This Court determined that the imposition of the fire fee did not implicate the equal protection and due process rights of the residents of Bridgeport First Due area, and likewise held that West Virginia Code § 8-13-13 does indeed give the right to a municipality to levy fees upon residents outside of their municipal limits. The Petitioner herein does not challenge the law on either of those points. There is, however, a third line of inquiry, and that is whether a service fee is a tax, which is impermissible, or a reasonable fee, which is lawful. It is on this point that the Petitioner believes the present case is distinguishable from *Davisson*.

The Respondent's position below discounted the possibility that a so-called service fee could be deemed a tax. The Respondent appeared to construe *Davisson* as suggesting that all fire fees, by definition, are fees and not taxes, seemingly eliding the central premise of the

Petitioner's defense. In the May 29, 2018 hearing, the Respondent asserted that:

MS. ROBERTS: [...] And number two, your Honor, all the issues of due process, taxation without representation, all of that has been dealt with in the *Davisson* case and many cases that are relied on by the *Davisson* case. So whether or not you live inside the City or not – just like fee for services, if you're provided water or sewage, it is a fee for service. The fire service fee is the same thing. It is not a tax in any regard. And even if Mr. Elza believes we haven't given him the information and somehow that converts a fire service fee into a tax, that's just not how it works.

(A.R.2., at p. 25-26). Conversely, this Court has held that:

"The character of a tax is determined not by its label but by analyzing its operation and effect." Syllabus Point 2, *City of Fairmont v. Pitrolo Pontiac-Cadillac*, 172 W.Va. 505, 308 S.E.2d 527 (1983).

Syl. Pt. 2, *Cooper v. City of Charleston*, 624 S.E.2d 716, 218 W.Va. 279 (2005). This Court has also held that "a reasonableness determination with regard to the question of excessiveness of an enacted fee is clearly an issue within the scope of review by a circuit court or by this Court on appeal." *Id.*, 624 S.E.2d at 724. In *Cooper*, this Court ruled on the challenge to the City of Charleston's user fee by a resident of South Charleston whose place of employment was in Charleston. The City of Charleston had passed a user fee of one dollar per week upon all persons who worked within the city limits of Charleston. This Court, in *Cooper* (as in *Davisson*) considered both whether the user fee was in fact a tax in sheep's clothing, and having determined that it was not a tax, considered whether it was reasonable.

Regarding the fee vs. tax question, this Court cited its previous holding: "The primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." *City of Huntington v. Bacon*, 196 W.Va. 457, 467, 473 S.E.2d 743, 753 (1996). *Cooper*, 624 S.E.2d at 722. See also *Shannon v. City of Hurricane*, Docket No. 11-0257 (W. Va., February 10, 2012) (memorandum decision). By analyzing the operation and the effect of the Elkins

First Due fire fee, the evidence at trial supports the proposition that it is a tax and not a permissible, reasonable fee. In the present case, the fire fee is not simply “cover[ing]” the expense of fire protection for the First Due area, but is in fact facilitating a dramatic increase in government spending. Plaintiff’s Exhibit 3 (A.R.1., at p. 113) shows the massive growth in expenditures. Before the collection of fire fees from individuals outside of Elkins city limits, the revenues and expenditures for providing fire service to Elkins and the First Due area ranged from just under \$300,000.00 to just under \$500,000.00. Then, during the last three years listed on the exhibit, the revenues and expenditures both skyrocket, even though the Elkins Fire Department did not take on any new responsibility for fire coverage. This is not a defraying of costs; it is a brand new source of revenue, which has additionally enabled the City of Elkins to reallocate general funds to other projects. Tracy Judy testified that the City of Elkins would have to pay for fire budget overages out of its general fund, and in fact did so to the tune of over half a million dollars over a six year period. (A.R.3., at p. 75-78, 102). Thus the First Due fire fee is likely a boon to Elkins municipal revenue, and not simply a supplement to the fire protection budget.

If the First Due fire fees were merely accomplishing a defraying of costs, then the revenues would stay similar, and the amount paid by city residents would be reduced proportionally to the contributions of the First Due area residents. Instead, Elkins residents are continuing to pay in the mid 400 thousand dollar range, as shown on Plaintiff’s Exhibit 5 (A.R.1., at p. 119), which is the same amount they were paying in fiscal years 2014 and 2015, as shown on Exhibit 3.

Even if this Court holds that the First Due fire fee is a fee and not a tax, the fire fee is excessive and unreasonable, and hence should not be enforced as to the Petitioner. In addition

to the above figures demonstrating the rapid bloating of the Elkins fire budget, the burden is high relative to other fees that have previously been upheld by this Court in several respects. In *Cooper*, the fee that was upheld was one dollar per week, or \$52.00 annually. The Petitioner is assessed 262.52 per year for the First Due fire fee (A.R.3., at p. 99). In *Davisson*, the fire fee revenue generated from outside the city accounted for only 7% of the overall fire protection budget, while in the instant case, Tracy Judy testified that the first due area residents bore 40% of the brunt. (A.R.3., at p. 112-114). Of course, the most relevant information that the Circuit Court could have used to determine whether the fee was reasonable was never able to come into evidence, as discussed in greater detail in the following section.

3. Second Assignment of Error: The Circuit Court erred by denying the Petitioner's motion to require the City of Elkins to provide information in discovery that would be necessary to determine whether the fire fee was an unreasonable fee.

Given the fact that 40% of the financial burden is borne by the First Due area fee payers, the most salient fact in ascertaining whether the fire fee is reasonable is what percentage of expenses are incurred by providing services in the First Due area outside of Elkins city limits. The Petitioner requested and attempted to ascertain this information over and over again. Specifically, he asked for it in discovery, and asked the Circuit Court to order the Respondent to produce the information. When those efforts failed, he drove to Charleston prior to the trial in an effort to obtain this information from the State Commission. Although he was not successful in admitting this documentation at trial, the Petitioner asserted during closing arguments that the fire department expenditures outside of Elkins city limits probably made up 20% of the expenses (A.R.3., at p. 126-128).

No one knows at this juncture whether that figure is accurate, because the Respondent never provided that information as requested. The Respondent asserted that it was not required

to produce this information in a format of the Petitioner's choosing; yet the Petitioner's discovery request was entirely within the permissible scope of discovery pursuant to Rule 33 of the West Virginia Rules of Civil Procedure, which permits written interrogatories. Although the Petitioner, acting pro se, did not style his request as an interrogatory, it is nevertheless an appropriate request, and it was error for the Circuit Court to decline to order it to be answered. The proper scope of discovery is set forth in Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, which states:

In general. — Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Clearly, a breakdown in expenses for the City and the First Due area is not privileged, it is relevant to the point of being nearly dispositive, it relates directly to the Petitioner's defense. Additionally, the Petitioner's "Defendant's Request to Make the City of Elkins Comply with My Motion to Produce Documents" is clearly a Motion to Compel under Rule 37(a) of the West Virginia Rules of Civil Procedure. (A.R.1.. at p. 32-35). The Circuit Court erred in blatant violation of the purpose of discovery as described in the Rules by declining to take action to enable the Petitioner to obtain expense information broken down by the location where service was provided.

Although the Petitioner asserts and suspects that the First Due area receives less in expenditures compared to the amount of fee revenue it generates in comparison with the City of Elkins, the ability to effectively assert this defense was nullified by the Circuit Court's ruling. If

this Court grants relief and remands for the production of this information, one of a few results will take place. If the expenditures show that the First Due area is paying dramatically more than it is receiving in services, it will bring the reasonableness of the fee into question. If the First Due area is paying an amount roughly proportional to the amounts expended on it (or even paying a disproportionately low amount, then the Petitioner's defense will be undermined. There could also be a gray area subject to argument, but the validity of the fire fee cannot be reasonably resolved in the Respondent's favor without determining the answer to this inquiry.

Here, *Davisson* is instructive. This Court conducted the following analysis in determining that the Bridgeport fire fee was reasonable: an analysis that is completely impossible to conduct in this case because the Petitioner's information request was not fulfilled:

In discussing the reasonableness of the fee, the City asserts that literally hundreds of people and property owners living outside the City's limits benefit from the City's fire protection services. The City estimates that **twenty-seven percent of the total calls made by the fire department are calls responded to outside the City's limits**. The City currently collects fire service fees within its corporate limits which provide approximately twenty-two percent of the funding of the City's fire department's annual budget of \$2.7 million. **Projected revenues from the fire service fee for property outside the City limits are \$200,000, or about seven percent of the total** operating budget of the fire department. Therefore, we agree with the circuit court that the amount of the fee is reasonable because it equitably serves the purpose for which it was enacted. Significantly, all revenues generated pursuant to the ordinance will be used to defray expenses of providing fire service protection to the users of those services.

Davisson, at p. 5 [emphasis added]. In the instant case, we know that the First Due area is footing 40% of the bill. Before the reasonableness of the fee can be meaningfully ruled upon, it is necessary to know how much of the fire department's work is taking place outside of Elkins city limits.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the Circuit