

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STANDARD DISTRIBUTING INC.,
and ASSOCIATED WINE AND SPIRITS, INC.
and ROBERT PERSON

Petitioners,

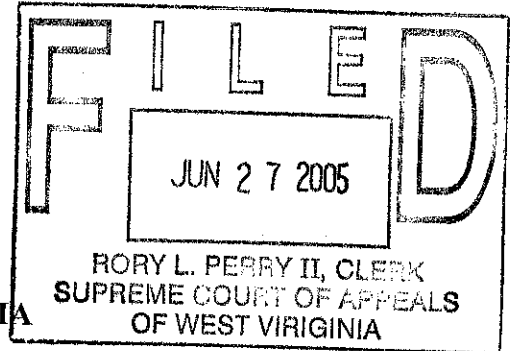
v.

Civil Action No.: 04-C-1571
JUDGE James C. Stucky

CITY OF CHARLESTON,

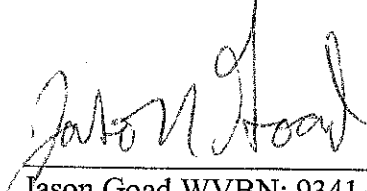
Respondents.

FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA



PETITIONER'S BRIEF REGARDING CERTIFIED ASSIGNMENTS ERROR

NO.: 32707



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I. INTRODUCTION

Petitioners Robert Person and Standard Distributing, by their counsel, Jason Goad and Hunt and Serreno respectfully submit this Brief regarding the Dismissal Order this Court has accepted and agreed to review pursuant to West Virginia Rules of Appellate Procedure. As discussed below, this Court should clearly hold that Respondent is liable to Petitioner for every illegally obtained licensing payment that was ever procured to Respondent City or in the alternative, that Respondent is liable to Petitioner for every illegally obtained licensing payment that was paid to Respondent dating three years prior to this Court's decision in Rite Aid of West Virginia Inc. v. City of Charleston, 434 S.E.2d 379 (W.Va. 1993).

II. KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL

In this case, Petitioners, Robert Person and Standard Distributing seek to recover monies paid to Respondent, City of Charleston as a result of a city liquor licensing fee. Petitioner brought suit in the lower Tribunal pursuant to this Court's holding in Rite Aid and West Virginia Code § 60-4-18, both of which state that a city can not make the exercise of a state issued liquor license contingent upon a city license or fee. On November 8, 2004, the Circuit Court of Kanawha County dismissed Petitioner's action for all but three years of overpayment. This dismissal was based on the immunity provisions of the Governmental Tort Claims and Insurance Reform Act, that the Petitioner had made voluntary payments to Respondent, that Respondent provided predeprivation relief, and that Petitioners did not set forth sufficient evidence to establish that the Respondent committed fraud or collusion by concealing or misrepresenting any material fact in relation to this case. The lower Court awarded Petitioners three years of payments merely

because a three year refund was/is provided for by City Ordinance 6-137.

III. STATEMENT OF FACTS

Petitioner Robert Person owns Petitioner Standard Distributing Company, which is in the business of wine distribution and is located in Charleston West Virginia. As a result, Respondent charged a city liquor license fee that was specifically for distributors. This fee amounted to \$2,500 per year and payments were made every year from 1982 to 2002. Payments were made as a result of Respondent sending reporting forms to Petitioners place of business to be filled out and sent back in along with the payments. In 1993, this Court heard a challenge from Rite Aid of West Virginia Inc that challenged this Respondent's right to collect said fee for a city liquor license. This Court held against Respondent in this 1993 case cited above, stating that the city license and the fee were invalid as they made the exercise of a State issued liquor license contingent upon a city license and fee. Respondent continued to charge said fee to Petitioner for nine years after this fact. When Petitioners became aware of the holding in Rite Aid they initiated settlement negotiations with Respondent. When a settlement was unable to be reach, Petitioners filed suit in the Circuit Court of Kanawha County.

IV. ASSIGNMENTS OF ERROR

The Circuit Court erred in holding Petitioner's payments were voluntary. The Court's ruling on this issue was based on Respondent's argument that fees were "self reporting". This derives from the fact that Respondent sent Petitioners a form to fill out every year when the fee came due. The form was specifically for liquor licensees and it had boxes for retailer, distributor, etc, and the appropriate fee next to each. As Petitioners were/are distributors, they were required to mark the appropriate section which then let them know they owed Respondent \$2,500 for the

year. It will be discussed below, that the payments were involuntary, as Petitioners paid said fees merely to avoid a serious business disadvantage.

The Circuit Court erred in holding that Petitioners were afforded predeprivation relief. The Court's ruling on this issue was based on the argument that Petitioners were afforded the opportunity to withhold payment and have a hearing in which they could challenge the validity of the fee and the city license requirement. It will be discussed below that this amounted to no predeprivation relief at all because, upon non-payment, the city collector had the duty to not renew Petitioners' license which would leave Petitioners no right to transact business within the city.

The Circuit Court erred in holding that the Respondent is immune from liability in this instance. This holding was based on the argument that the Governmental Tort and Insurance Reform Act, which is codified as West Virginia Code § 29-12A-5 et. seq, extends immunity to Respondent in this instance. It will be discussed below that immunity can not be extended in this instance because of the State's intent to abrogate, and that the holding in Rite Aid precludes the City from claiming immunity in this instance, and that Respondent's conduct precludes them from claiming immunity.

V. ARGUMENT

A. Introduction

Petitioners set forth to support, through the following arguments, three alternative positions. The first position is that Petitioners are entitled to a full refund of all twenty overpayments because. This is based on the fact that, in the face of a lack of predeprivation relief, the Due Process Clause of the Fourteenth Amendment requires meaningful retroactive

relief regardless of any immunities or statute of limitations issues. This position is predicated by the fact that Petitioners payments were involuntary. An alternative argument allowing for a refund of all twenty overpayments is that Respondent's actions were negligent based upon a duty imposed by West Virginia Code § 60-4-18, and Respondent's actions constituted a continuing tort.

Secondly, Petitioners alternative position is that they are entitled to a refund of overpayments dating back three years prior to the Rite Aid decision because this decision, and the actions of Respondent after this decision, preclude any immunities and constitute a continuing tort.

Thirdly, Respondents committed acts shortly before the entry of the Dismissal Order, and Petitioners discovered these acts the day before the Dismissal Order, that show willful, wanton, and reckless conduct on the part of Respondent. As this conduct precludes any immunities provided, and as this conduct was put on the record one day before the Dismissal Order, dismissal was inappropriate as Petitioners could show a set of facts of which recovery could be obtained.

B. Regarding the Count for Unconstitutional Deprivation of Property, Petitioners' payments to Respondent can not be considered to be voluntary because they were paid under duress merely to avoid a serious business disadvantage, and as there was no adequate predeprivation relief in place.

Chapter 18 of the Charleston City Code purports to give Respondent the authority to impose an additional tax or fee on any license issued by the State. Charleston City Code 18-36 takes this even further by having the title "Conditions Precedent to Doing Business", and states

that payment of all business licenses or fees is a condition precedent to the transaction of business. Therefore, Petitioners paid this fee merely to avoid a serious business disadvantage, which would be not being able to do business at all. In this situation, payment can not be considered voluntary. On this issue, Little v. Bowers, 134 U.S. 547 (1890), controls. The Court defines what is an involuntary payment or a payment made under duress and notes that “where one pays an illegal demand with full knowledge of the law, without an immediate and urgent necessity thereof, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and can not be recovered back.” Id at 554. In this instance, Petitioners did indeed have an immediate and urgent necessity to render payment. That necessity was to keep their doors open for business. Without making payments, Petitioners would have suffered a serious disadvantage in the business world by losing a significant capital investment, losing significant profits, and would have jeopardized the job security of a significant amount of employees.

Atchinson, T & S F. R. Co. V. O’connor, 223 U.S. 280 (1912) addressed the specific issue of “serious disadvantage”. Here, the Court held that a payment is made under duress when a timely payment is proffered merely to avoid a serious disadvantage in the assertion of legal rights, should the payer withhold payment and await an enforcement proceeding in which he could challenge the validity of the fee or tax scheme. Id at 286. In Petitioners’ case, they could have withheld payment , but they would have lost profits and suffered business losses for an indefinite period until some kind of enforcement hearing. City Code Section 18-41 states that if any business does not pay the fee, then the city collector “shall refuse to renew an annual license on any business” that has failed to pay. Then, after the license has been forfeited, the business

has a right to request a hearing that must take place "within a reasonable time". The decision of this hearing is appealable to the Circuit Court within thirty days. Therefore, after the license has been forfeited, the business could be nonfunctional for a month or longer. It is wholly unreasonable and amounts to no predeprivation relief at all, to expect a business with a six to seven figure revenue to shut down for possibly a month or more over a \$2,500 fee.

This "condition precedent to doing business" requirement that Respondent has imposed is tantamount to a financial sanction, as not doing business has serious financial repercussions. In United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973) the issue of financial sanctions was dealt with specifically. Here the Court stated, "We have long held that when a tax in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under duress in the sense that the State has not provided a fair and meaningful predeprivation procedure." In this instance what the Petitioners faced in regard to this fee was either to pay, or to lose the right to do business. There were no meaningful predeprivation procedures in place, as Petitioners would have had to wait and lose business until the issue was settled at some sort of hearing. Under these circumstances, payment can not be considered voluntary, as this is clearly duress imposed by the payee City.

In addition to being out of business for a month or more, Petitioners were also subject to penalties in the event they would have withheld payment. Charleston City Code Section 18-44 states penalties will be imposed if fees are not paid. In its argument that the fees were not paid under duress, Respondent cites City Code Section 18-44. The reason for Respondent's citing of this code section is because this code section allows waiver of penalties "if the failure to pay the required license tax was due to reasonable cause and not due to willful neglect." Here,

Respondent is contending that the fees could have been withheld with no adverse effects. However, because the section excludes the waiver of penalties for “willful neglect”, which is a purposeful act, this section should be read as meaning that penalties will be waived in the event of a honest or excusable mistake. This section in no way purports to address withholding payment so as to challenge the validity of the fee.

Charleston City Code Section 18-41, as was discussed earlier, does in fact address the issue of challenging a fee or tax. This section states that if any business does not pay the fee, the city collector “**shall** refuse to renew an annual license on any business that has failed to pay.” Therefore, it is clear that in the event of a willful nonpayment, the license would not be renewed, thus suspending the right to transact business, with a hearing to be provided “within a reasonable time” which is appealable to the Circuit Court within 30 days. As was discussed earlier, this is wholly unreasonable and amounts to no predeprivation relief at all. It is for the above stated reasons that Petitioners’ payments can not be considered to be voluntary.

In the alternative, if all the fees paid from 1982 to 2002 are considered to be voluntary, the fees paid from 1993 to 2002 should be considered to be involuntary. As was stated earlier, Rite Aid was decided in 1993 and held the fees and ordinances in question here to be invalid. Rite Aid at 381. However, Respondent continued to collect this invalid fee pursuant to this invalid ordinance for nine years after Respondent knew they should not be collecting this fee. This improper conduct on the part of Defendant renders the payments made from 1993 to 2002 involuntary. On this issue Respondents cite to Tyler County Court v. Long, 77 S.E.2d 328 (W.Va. 1913). Respondent, in it’s Motion to Dismiss, while citing Long at 330 stats that “voluntary payment, made by mistake or ignorance of the law, but with full knowledge of the

facts, *and not induced by fraud or improper conduct on the part of the payee*, can not be recovered back. In the instant case, Respondent induced payment by mailing the forms and making payment a prerequisite to doing business. Respondent also continued to collect said fees for nine years after it knew collection was contrary to applicable law. This constitutes improper conduct, and thus nine years worth of overpayment should be considered involuntary.

C. Regarding the Count for Unconstitutional Deprivation of Property, as has been established, the predeprivation relief provided by Respondent in this instance is unreasonable and thus amounts to no relief at all, and thus, Respondent is now required to provide meaningful retroactive relief.

As was discussed earlier, in the event of a willful nonpayment in the event of a challenge, Petitioners would have lost their right to transact business within the city in which they were/are located. Petitioners would have been afforded a hearing “within a reasonable time” which was appealable to the Circuit Court within 30 days. It is wholly unreasonable for a business that has a six to seven figure revenue stream and multiple employees to support to shut down operations for a month or longer in order to challenge a \$2,500 fee. This amounts to no predeprivation relief at all.

The Due Process Clause of the 14th Amendment of the United States Constitution obligates Respondent to provide a refund of all twenty years of overpayment. When there is an unconstitutional deprivation of property, the Due Process Clause requires the government entity to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson Corp v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18,32 (1990)

When a governmental entity imposes fees or taxes, procedural safeguards must be

established to guard against the unlawful deprivation of property. Id at 36. The safeguards can be applied in either a predeprivation process or a postdeprivation process. Id. The predeprivation process would involve allowing taxes or fees to be withheld with objections being interposed at a tax enforcement proceeding. Id. Respondent has clearly failed to provide any predeprivation relief, as City Code 18-36 imposes a City license, which is paid for by a licensing fee, as a condition precedent to doing business. Therefore, Petitioners have paid this fee under duress, as they proffered a timely payment merely to avoid a serious business disadvantage. Id at 39.

As Respondent failed to provide Petitioners with predeprivation relief, the City must provide postdeprivation relief. Id at 35. In order to preserve due process, Respondent must provide meaningful retroactive relief. Id. To say that Petitioners are deserving of anything less is nothing short of saying that Respondent could take the property of Plaintiff without due process of law. Id at 33. In fact, the U.S. Supreme Court has stated that an entity that has suffered an unlawful deprivation by State action has "an undoubted right to recover the moneys it has paid." Id at 35. It is for these reasons that Petitioners are entitled to the full twenty years of overpayments, as a two year statute of limitations does not apply to an unconstitutional deprivation of property, as anything less than a full refund will fall short of the meaningful retroactive relief imposed by the Courts.

In the alternative, Petitioners are entitled to recover for every year of overpayment because Respondent's actions constituted a continuing tort, and thus the statute of limitations did not begin to run until July of 2002, when the last payment was induced and proffered. Respondent's actions throughout this process, starting in 1982 and ending in 2002, amounted to

temporary but continuing acts of negligence. Respondent had a duty to know the applicable law regarding the issuance and fee for a City liquor license. Respondent breached that duty by charging the fee irrespective of the law. As a result of Respondent's breach, Petitioners suffered severe economic harm. Respondent continued this series of temporary negligent acts for twenty years, and inflicted twenty separate and distinct economic injuries upon Petitioners. In Taylor v. Culloden Public Service District, 591 S.E.2d 197 (W.Va 2003) this Court answered this issue of distinct instances of injury resulting from temporary yet continuing acts. While this Court was applying the law to a nuisance action, the analysis is applicable to all tort actions, as this Court specifically refers to the nuisance being a tort. This Court held that where acts which constitute a tort are continuing in the sense that distinct instances of injury result from the tort, as opposed to a singular injury, and the tortious acts are capable of being abated or discontinued, the temporary tort continues until such time as those acts are abated or discontinued. *Id.* at 205. Therefore, the two year statute of limitations does not begin to run in a tort action where the tort at issue is both temporary and continuing until the date of the last injurious act or when the acts constituting the tort have been abated or discontinued. *Id.* In the instant case, Respondent's actions were temporary in the sense that the actions occurred once a year. However, Respondent's actions also continued for twenty years. Furthermore, Respondent's actions were capable of being abated or discontinued. Therefore, although Respondent's actions were temporary, they constitute a continuing tort.

In the alternative, if it is determined that the actions from 1982 to 1993 are not tortious, then Respondent's actions from 1993 to 2002 constitute a continuing tort, as Rite Aid established a duty to discontinue collecting the fee, as the Court held the fee was invalid and as Respondent

was incorrect in the collection.

In the alternative, should Respondent's actions not be deemed to constitute a continuing tort, then Respondent's actions were nonetheless tortious and the statute of limitations was tolled in 1993 by the Rite Aid decision. Respondent knew this fee was invalid in 1993. However, Respondent continued to collect this fee from Petitioners for nine years after the fact. Further, the West Virginia Code § 29-12A-6C states, "[t]he periods of limitations set forth in this section shall be tolled for any period during which the political subdivision or its representative has committed fraud or collusion by concealing or misrepresenting facts about the injury." Therefore, as Respondent knew the fee was invalid, and as the Respondent concealed or misrepresented this material fact to Petitioners by continuing to send out forms to pay the fees and continuing to collect said fees, the statute of limitations was tolled in 1993.

D. In regard to the Negligence Count of the Complaint, Respondent is precluded from claiming the immunity provisions of the Governmental Tort and Insurance Reform Act because of this Court's decision in Rite Aid and further because of Respondent's conduct.

In defense of the negligence Count of the Complaint, Respondent seeks immunity under the Governmental Tort Claims and Insurance Reform Act under West Virginia Code § 29-12A-5(a). The first subsection that applies is subsection (1) which grants immunity for legislative or quasi-legislative functions. Blacks Law Dictionary defines a legislative function as "[t]he determination of a legislative policy and its formulation as a rule of conduct." Here, while Respondent once determined a legislative policy to collect a city liquor license fee pursuant to the issuance of a city liquor license and formulated it as a rule of conduct as per the city code, This Court in Rite Aid held that Respondent overstepped its boundaries in doing so. Therefore,

when Respondent kept issuing this license and charging for it as a prerequisite to doing business in disregard of the Rite Aid decision, it was performing an illegal function that no longer was a legislative or quasi-legislative function.

The next subsection of which Respondent relies is subsection (8) which provides for immunity for “[a]ssessment or collection of taxes lawfully imposed or special assessments license or registration fees or other fees or charges imposed by law.” It is clear that this subsection only grants immunity for fees and taxes that are “lawfully imposed”. As West Virginia Code 60-4-18[1935] specifically prohibits cities from imposing a fee or special tax as a condition upon the exercise of a state issued liquor license, and as this Court invalidated this fee and license in Rite Aid, this fee was unlawful both before Rite Aid and after. Accordingly, no immunity is extended to Respondent under this subsection.

The next subsection of which Respondent relies is subsection (9) which provides immunity for “[l]icensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority.” In this instance, because of West Virginia Code § 60-4-18 [1935], no licensing power ever existed with respect to the power to issue a liquor license. Further, this Court affirmed this in Rite Aid by affirmatively conveying to the Respondent that they did not have the power to issue and collect a fee for a city liquor license. Accordingly, no immunity is extended to Respondent under this subsection.

The last subsection of which Respondent relies is subsection (4) which provides for immunity for “[a]doption or failure to adopt a law, including but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy.” This argument being

in the alternative of all other arguments contained herein, in this instance this Court's holding in Rite Aid created an action for failing to revoke a law. Subsection (4) provides immunity for adopting a law or failing to adopt a law. This subsection does not provide immunity in the instance of a municipal corporation failing to revoke a law after the highest Court in the State deemed a law to be invalid. Therefore, this Court's holding in Rite Aid created an affirmative duty for Respondent to revoke the requirement of the purchase of a city liquor license. This duty was breached when the requirements were left on the books and they continued to collect fees from Petitioners. This subsection does not address this breach, and thus no immunity can be afforded under this subsection.

Another reason that immunity can not be extended for Respondent's negligence is that a special relationship existed between Respondent and Petitioners. This Court has made it clear that the enactment of the Governmental Tort Claims and Insurance Reform Act did not abrogate the special relationship exception to the public duty doctrine. Holsten v. Massey, 490 S.E.2d 864, 872 (W.Va. 1997). "To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking." In this instance the assumption by the local governmental entity is established by Respondent sending Petitioners the reporting forms via direct mail. By sending these reporting

forms, which demand licensing payments, Respondent is undertaking an affirmative duty representing that they have a right to issue the license and a right to collect fees for the license. Knowledge on the part of Respondent's agent that inaction could lead to harm is also established in this instance. Respondent's agents were on actual notice that they had no right to issue this license and collect this fee. Further, agents working in the capacity where their job involves taxes or fees, have an affirmative duty to know the applicable law concerning taxes and fees, and they have an affirmative duty to act according to the law. Direct contact is also established in this instance, again through the direct mailing of the reporting forms and the "demand letters" demanding payment, which accompanied the forms. Finally, it is established that Petitioners justifiably relied on the fact that the Respondent, as they are the capital of this State, would not be issuing licenses and collecting fees when they had been told by the State Supreme Court of Appeals that they were not allowed to do so. Petitioners should not be required to approach transactions with their local governing bodies with suspicion. It is reasonable to assume that local government leaders would not act in contradiction with the law, when they had actual notice of what the law is. Accordingly, because of the special relationship that exists in this instance, which is the basis for the special duty that exists, the immunities cited by Respondent are a moot issue and they can not apply.

Another reason that immunities can not apply in this instance is because the State, by way of West Virginia Code § 60-4-18 and by way of this Court, has abrogated any immunities extended by the Governmental Tort Claims and Insurance Reform Act. This Court's decision in Rite Aid clearly shows intention of this Court to abrogate immunity under the Act in regard to this fee. Further, the State Legislature has also shown intention to abrogate immunity in this

instance, as West Virginia Code § 60-4-18 states that a city can not make the exercise of a State license contingent upon a city fee. Should Respondent be allowed to continue to claim immunity in the face of this Court's decision and in the face of State Code, then this means Respondent can go on indefinitely collecting this unlawful fee from others with no repercussion. Respondent could simply assert immunity under the Act continually, without regard for this Court's ruling or the State Legislature's intent. Unfortunately, there is no authority in support of Petitioners' position regarding this issue. This is because, as far as the undersigned can tell, no municipal corporation in this State or anywhere in this Country has ever continued to collect a fee or tax after a high Court has deemed that fee or tax invalid. No municipal corporation has ever acted this irresponsible and/or brazen so as to continue collecting a fee after such a ruling. Thus, according to the undersigned's research, this specific issue has never been litigated to the extent that the case would have been reported. However, the undersigned sees no reason to cite to the obvious. Respondent continued to undertake an act which they were told they were not allowed to do. Common sense dictates that immunity can not be extended in this instance.

Yet another preclusion to immunity in this instance is that the immunities provided to municipal corporations can not extend because Respondent was not acting as a municipal corporation in this instance. When Respondent continued to collect a fee contrary to this Court's ruling, it exceeded its powers as a municipal corporation. Respondent essentially exceeded its corporate charter bounds by undertaking an illegal act. Therefore, any acts undertaken outside of the corporate charter bounds can not be considered acts that fit within the immunity provisions cited. What the Respondent did is essentially obtaining money by false pretenses. Again, there is no authority supporting this because no municipal corporation has ever acted directly against a

Court's ruling to the extent that appellate litigation ensued.

Unjust enrichment is a further preclusion to immunity in this instance. Any time a person or entity has in possession money, which has come into his hands under circumstances which make it unjust for him to retain it and which in equity and good conscience belongs to some other person, unjust enrichment applies. Shanks v. Wilson, 86 F.Supp. 789 (S.D. W.Va. 1949).

Petitioners paid a yearly fee in good faith. Respondent collected this fee either through extreme negligence or willful, wanton, reckless, and fraudulent conduct. Therefore, these circumstances clearly show that it is unjust, inequitable, and disrupts a good conscience for Respondent to retain the money Petitioners paid in good faith. Therefore, the immunities cited can not apply in this situation.

Petitioners received correspondence from Respondent on November 4th of 2004, which was over five months after the suit was filed which is the subject of this appeal. This correspondence was also over two months after Respondent filed it's Motion To Dismiss. This correspondence was a letter from Respondent's employee, Tonya Cotton, who is the Business and Occupations Tax supervisor. In this letter she reminds Petitioners that he had not paid his City liquor license fee for the year and further states, "Section 6-1 stipulates that no person shall, without a currently valid city license, engage in or prosecute, within the city, any of the businesses, activities, trades or employments named in this chapter." Obviously, this purports to give authority for Defendant to collect fees and provide a license under Chapter 6 of the City Code, and this Chapter relates to Alcoholic Beverages, **and this letter pertains to the same license and fee that was addressed by this Court in Rite Aid**. She further states, "Failure to renew your license by December 4th 2004 will result in legal action in the Municipal Court."

While this letter was dated November 4th, it was not read by Petitioners until November 17th of 2004. This was well after all the motions and memoranda concerning the Motion to Dismiss was submitted to the Court. The undersigned immediately submitted a Supplement to Plaintiff's Response to Defendant's Motion to Dismiss with the letter marked as Exhibit D and attached remittance form by facsimile on November 17th of 2004. The Dismissal Order was entered by the Court on November 18th of 2004, before Petitioners could make any Motions to Amend the Complaint, given newly discovered conduct that displayed vicarious willful, wanton, and reckless conduct on the part Respondent.

Continuing to harass Petitioners about payment of an unlawful fee regarding an unlawful license, not only after the decision in Rite Aid but after this suit was filed, is evidence of willful, wanton, and reckless conduct that has continued since 1993. West Virginia Code 29-12A-5(b)(2) expressly states that an employee can not claim immunity in the instance of willful or reckless conduct. Thus, Respondent will be vicariously liable for the tortuous actions of it's employees, as this is an economic tort and not a constitutional tort. Only in situations where the tort is of a constitutional nature, such as a civil rights violation, can a city not be held vicariously liable for the acts of its employees and agents. Hutchinson v. City of Huntington, 479 S.E.2d 649, 662 (W.Va. 1996). Therefore, as Petitioners had put on the record newly discovered evidence of willful, wanton, and reckless conduct, the immunities under the Act can not apply and dismissal was inappropriate.

VI. CONCLUSION AND PRAYER FOR RELIEF

Petitioners' argument is essentially three fold. Petitioners first contend that they are entitled to relief for the full twenty overpayments, regardless of any immunities and statute of

limitations issues because:

- a. The Due Process Clause of the Fourteenth Amendment requires meaningful retroactive relief, as the payments were involuntary and no predeprivation relief was provided.
- b. Respondents actions were negligent because the City Code was illegal from the beginning as per West Virginia Code § 60-4-18, and this amounted to a continuing tort which continued over the course of twenty payments.

Petitioners secondly, and in the alternative, contend that they are entitled to a refund of payments going back to 1990, which is three years prior to Rite Aid, regardless of any statute of limitations issues and immunities because:

- a. Respondents actions after Rite Aid constituted a continuing tort.
- b. The immunities can not apply because collecting the fee after Rite Aid can not be considered a legislative or quasi-legislative function, it can not be considered a lawfully imposed fee, it can not be considered to be pursuant to any licensing powers, and the actions are not adopting or failing to adopt a law (the action was actually failing to revoke a law which was deemed invalid).
- c. A special relationship existed between Petitioner and Respondent that imposed a special duty upon Respondent.
- d. That the State and this Court clearly intended to abrogate immunity with regard to this specific issue.
- c. That the Respondent is not entitled to immunities as a municipal corporation, because the actions after Rite Aid exceeded the corporate charter bounds.

d. That Respondent was unjustly enriched by Petitioners and immunities can not be extended in the face of unjust enrichment.

e. Charleston City Code 6-137 authorizes license fee refunds for up to three years of overpayment. Although, Charleston City Code 6-137 is now Charleston City Code 110-33 and as amended in 2002 by Bill No. 6799 § 6-137, 1-22-2002 only applies to Business and Occupation taxes, it was in effect and applied to liquor license holders at the time of the cause of action in the present case arose.

Therefore, the lower Court ruled that Petitioners were allowed a refund of three years of overpayment. However, as this Court knows, it is Petitioners contention that they are allowed overpayment refunds going back to Rite Aid in addition to **this three years worth of refunds.**

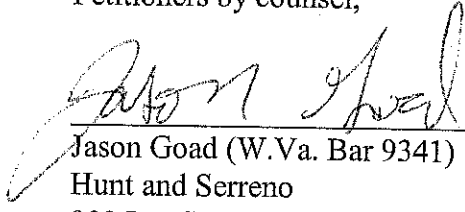
Petitioners thirdly, and in the alternative, contend that dismissal was inappropriate because:

a. evidence of willful, wanton, and reckless conduct was discovered and put on the record the day before the dismissal order was entered.

b. Said willful, wanton, and reckless conduct would have precluded any immunities pled by Respondent, and thus given Petitioners a set of facts of which recovery could have been obtained.

WHEREFORE, Petitioners pray for this Court to reverse the Dismissal Order entered by the Circuit Court and remand this case to be decided in a manner consistent with all or any of the arguments presented above.

Respectfully submitted
Petitioners by counsel,

A handwritten signature in cursive script, appearing to read "Jason Goad", is written over a horizontal line.

Jason Goad (W.Va. Bar 9341)
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900 Lee Street
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(304)343-8001

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STANDARD DISTRIBUTING INC., and
ASSOCIATED WINE AND SPIRITS, INC.
and ROBERT PERSON,

Petitioner,

v.

CIVIL ACTION NO. 04-C-1571
(JUDGE O.C. SPAULDING)

CITY OF CHARLESTON,

Respondent.

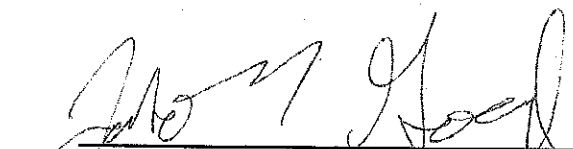
CERTIFICATE OF SERVICE

I, Jason Goad, counsel for the Petitioner's, do hereby certify that I have served a true and exact copy of the attached **PETITIONER'S BRIEF REGARDING CERTIFIED ASSIGNMENTS ERROR** to counsel of record by mailing a true and exact copy thereof by United States mail, postage prepaid, to the following:

Karen T. McElhinny
Shuman, McCuskey & Slicer
1411 Virginia Street, East
Suite 200
Charleston, WV 25339

City of Charleston
P.O. Box 2749
Charleston, WV 25330

Dated this 27th day of June, 2005.


Francis M. Curnutte, III WVSBN 905
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