

**IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA**

HUNTINGTON TRI-STATE AUDUBON SOCIETY,  
MOUNTAINEER CHAPTER OF THE AUDUBON SOCIETY  
SHEILA McENTEE,  
MICHAEL FORMAN and  
LITTLETON W. TAZEWELL

Petitioners,

v.

CA No. 00-C-2264

DIVISION OF MOTOR VEHICLES,  
WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, and  
RACE PLATE MARKETING, LLC.,

Respondents.

and

No. \_\_\_\_\_

HUNTINGTON TRI-STATE AUDUBON SOCIETY,  
MOUNTAINEER CHAPTER OF THE AUDUBON SOCIETY  
SHEILA McENTEE,  
MICHAEL FORMAN and  
LITTLETON W. TAZEWELL

Petitioners,

v.

CA No. 00-C-3008

DIVISION OF MOTOR VEHICLES,  
WEST VIRGINIA DEPARTMENT  
OF TRANSPORTATION, and  
NATIONAL ASSOCIATION FOR STOCK  
CAR RACING, INC.,

Respondents.

**CONSOLIDATED PETITION FOR APPEAL**

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**CONSOLIDATED PETITION FOR APPEAL**

PETITIONERS, HUNTINGTON TRI-STATE AUDUBON SOCIETY,  
MOUNTAINEER CHAPTER OF THE AUDUBON SOCIETY, SHEILA McENTEE,  
MICHAEL FORMAN and LITTLETON W. TAZEWELL, by Counsel, submit this Petition for a

Appeal from:

(a) the October 5, 2000 decision of the Honorable James Stucky, Circuit Court of Kanawha County, in CA No. 00-C-2264, and

(b) the January 31, 2001 decision and order of the Honorable Paul Zakaib, Jr., Circuit Court Judge of the Kanawha County, in CA No. 00-C-3008.

This Court has appellate jurisdiction over this matter under W. Va. Const. Art. 8, Sec. 3, W. V. Code § 51-1-3, and Rule 14, W. Va. R. App. P. This petition to invoke the Court's appellate jurisdiction is proper under W. V. Code § 58-5-3. All parties have consented to the filing of this consolidated Petition for Appeal.<sup>1</sup>

## **I. NATURE OF PROCEEDING AND RULING BELOW IN CA NO 00-C-2264.**

### **A. September 8, 2000 Complaint and Motion for Preliminary Injunction**

On September 8, 2000, Petitioners filed a Complaint and a Motion for Preliminary Injunction in the Circuit Court for Kanawha County, West Virginia seeking to have a contract entered into between Respondents, pursuant to a March 11, 2000 legislative enactment that authorized the issuance of "race theme" license plates, declared to be in violation of applicable constitutional and statutory provisions. At a September 14, 2000 hearing on the Respondents' motion for preliminary injunction, the Honorable James C. Stucky denied the Petitioners motion and set the case for trial on merits on October 2, 2000.

<sup>1</sup> Rule 3, R.A.P., entitled "PETITION FOR APPEAL," provides that "Appeals may be consolidated by order of the Supreme Court upon its own motion, or upon motion of a party, or by stipulation of the parties to the several appeals."

B. September 25, 2000 Motion to Continue October 2, 2000 Trial

On September 25, 2000, Judge Stucky denied Petitioners request for a continuance of the October 2, 2000 trial, and granted in part Respondent Race Plate Marketing's Motion for a Protective Order pertaining to certain discovery requests.

C. September 28, 2000 Amended Complaint

On September 28, 2000 Petitioners filed an Amended Complaint which added a cause of action against Respondents alleging that the September 1, 2000 contract had been entered into without competitive bidding and without qualifying for any applicable exception from the requirement for such bidding.

D. October 2, 2000 Trial

At trial on October 2, 2000 witnesses testified and exhibits were admitted. At the conclusion of oral argument on October 3, 2000, Judge Stucky ruled in favor of Respondents on all issues, and requested counsel for the Respondent DMV to prepare an order, which was submitted and entered on October 5, 2000.

E. October 5, 2000 Findings of Fact and Conclusions of Law

In his October 5, 2000 order, Judge Stucky ruled:

1. that the DMV's payment to Respondent Race Plate Marketing of royalty fees for the use of NASCAR-related copyrights and trademarks on "race theme" license plates was part of the "cost of administration" of the DMV, and did not violate any prohibition contained in Article 6, § 52 of the West Virginia Constitution (the so-called "Highway Trust Fund") or W. Va. Code § 17A-3-14 (DMV's enabling legislation);
2. that as of September 1, 2000, Race Plate Marketing was the "sole source" of the copyrights and trademarks covered by the September 1, 2000 contract with DMV and "as such the Division of Motor Vehicles was not required to submit the contract for public bid," and

3. that the Respondents had not carried their burden of proof with regard to the claim that DMV violated the F.O.I.A. in its response to Respondent's request for records pertaining to "race theme" license plates.

## **II. NATURE OF PROCEEDING AND RULING BELOW IN CA NO. 00-C-2264.**

### **A. Petitioners' November 22, 2000 Complaint and Motion for Preliminary Injunction**

On November 22, 2000, Petitioners filed a Complaint and a Motion for Preliminary Injunction seeking to enjoin temporarily and permanently the DMV's payment of license plate revenues to NASCAR, Inc. pursuant to a November 6, 2000 contract which, retroactive to September 1, 2000, complimented the contract entered into between DMV and Race Plate Marketing, which had been the subject of litigation before Judge Stucky the preceding October.

### **B. Respondents' Motion to Dismiss and January 4, 2000 Hearing.**

Respondents DMV and NASCAR, Inc. filed a motion to dismiss which was consolidated with Petitioner's Motion for a Preliminary Injunction at a hearing held on January 4, 2001. No testimony was taken at the January 4, 2001 hearing, and Judge Zakaib took the matter under advisement.

### **C. January 31, 2001 Decision and Order**

On January 31, 2000, Judge Zakaib entered an Order granting Respondents' Motion to Dismiss holding that the payment of royalties to NASCAR, Inc. "represents costs incident to the duties of the Division of Motor Vehicles and are part of the cost of administration of the Division of Motor Vehicles." As such, the Court concluded, those payments "do not violate Article 6, § 52 of the Constitution of the State of West Virginia or West Virginia Code § 17A-3-14.

### III. STATEMENT OF FACTS.

#### A. West Virginia Voters Amended Their Constitution In 1996 To Impose Mandatory Limits On Use Of License Plate Fees As A Means Of Funding Wildlife Conservation Programs

Organizational petitioners include HUNTINGTON TRI-STATE AUDUBON SOCIETY, an unincorporated association of individuals, and MOUNTAINEER CHAPTER OF THE AUDUBON SOCIETY, a West Virginia corporation. Both organizational petitioners are affiliated with the National Audubon Society, and dedicated to the preservation of wildlife, including nongame wildlife in the State of West Virginia.

Individual petitioners include SHEILA McENTEE, MICHAEL FORMAN, and LITTLETON W. TAZEWELL. All individual petitioners are citizens of the State of West Virginia, and own motor vehicles licensed for operation in the State of West Virginia which bear nongame wildlife license plates. Individual petitioners were active participants in the citizen effort in 1996, led by the Wildlife Conservation Alliance, to amend the West Virginia Constitution by adding Article VI, § 56 to provide for the payment of funds from the sale of nongame license plates to the West Virginia Division of Natural Resources.

In her affidavit filed with the Petitioners' Motion for a Preliminary Injunction, and in testimony at the hearing on that motion, which was incorporated into the record at trial, (Oct 2 Trans at 21),<sup>2</sup> Sheila McEntee testified to the following facts, which were not contradicted by any witness or in any way impaired by the October 5, 2000 holding of Judge Stucky.

From 1993-1998, Ms. McEntee was one of the primary organizers of statewide efforts to gain a permanent, and stable funding source for the West Virginia Division of Natural Resources Nongame Wildlife and Natural Heritage Program. Ms. McEntee conducted advocacy efforts as

president of the Vandalia Chapter of the National Audubon Society; vice president and, later, legislative coordinator for the West Virginia Audubon Council; and as a primary organizer for the Nongame/Natural Heritage Committee and the Wildfire Conservation Alliance. Ms. McEntee has served Nongame Advisory Council since her appointment by Governor Caperton in 1994.

The Division of Natural Resources (DNR) Nongame Wildlife and Natural Heritage Program (NWNHP) was established in the early 1980s to study, monitor, inventory, and manage West Virginia's nongame wildlife species—including the state's 20 federally endangered and threatened species—and rare plant resources. While a very small program compared to the larger management programs for game species, the NWNHP is nonetheless the steward of over 90 percent of West Virginia's wildlife species.

When it was first established in 1981, the Nongame Wildlife and Natural Heritage Program was funded on a small scale by a voluntary state income tax checkoff. As the only option on the checkoff list in 1981, the NWNHP received \$167,203. During the 10-year life of the checkoff, six competing interests were added as options on the checkoff. They included a utility assistance fund, children's trust, adult literacy, guilding of the Capitol dome, the state veterans memorial, and the preservation of historic properties. NWNHP funding diminished as follows:

1982	\$128,650
1983	\$99,365
1984	\$75,191
1985	\$79,667
1986	\$53,898
1987	\$31,495
1988	\$24,551

<sup>2</sup> References "(XXX YY, 2000 Trans at \_\_\_)" are to the various transcripts of proceedings below on September 14,

1989 \$15,846

1990 \$14,891

The program's funding dwindled, as more and more options were added to the check-off list, and eventually the check-off option was eliminated altogether. Unlike wildlife management programs for hunted species, which are funded through hunting and fishing license fees, the NWNHP was left with no ready funding mechanism. By the early 1990s, it was operating on a much-reduced basis on funds raised from the sale of pins, belt buckles, and calendars, and with some federal funding for endangered species management.

In 1991, the governor-appointed Nongame Advisory Council, seeking wider public awareness and support for the program's funding dilemma, hosted a meeting of concerned citizens in Flatwoods. The outcome of this meeting was the formation of the Nongame/Natural Heritage Committee, which included members of conservation and environmental organizations, garden clubs, sportsmen's groups and concerned corporations. This committee began concerted efforts to educate state legislators about the importance of the NWNHP and to seek a funding source.

By 1993, the program's funding need was better understood at the legislature, but the problem was not solved. Several funding mechanisms had been drafted into bills and proposed, including a portion of a motor boat fuel tax, a small tax on motor vehicle registrations, a small percentage of the real estate transfer tax, a tax on pet food, and the issuance of a wildlife stamp. All failed to gain legislative approval. Later, a small portion of lottery funds was suggested as a funding mechanism. Bills to transfer monies from camping and state park lodging fees and civil administrative penalties (hunting and fishing violations) also failed to pass. During this time,

September 25, and October 2, 2000

advocates continued to raise the NWNHP profile at the legislature, sponsoring an annual Nongame Wildlife Day at the Capitol and distributing fact sheets and a video about the program to all legislators.

In 1994, as a result of advocates' persistent efforts, Governor Caperton and the West Virginia Legislature approved an annual general revenue appropriation of \$400,000 for the program. While a major accomplishment for the program that assured its continued existence, this did not represent a permanent funding source and fell far short of the projected \$1.5 million the program required to fully carry out its extensive mission.

Education and advocacy efforts, as well as the search for a permanent source of funding that would be acceptable to legislators, continued. In 1995, the governor and the legislature increased the NWNGP's general revenue appropriation to \$550,000. At the same time, the idea for a wildlife motor vehicle license plate, a completely voluntary means of raising funds for state wildlife, was proposed by advocates. The idea was proposed after extensive research was conducted and information was obtained from other states that were already using license plates to raise money for wildlife programs. Many legislators in West Virginia liked the voluntary aspect of this mechanism.

Yet, it was soon discovered that a legal issue stood in the way of legislating this funding mechanism in West Virginia. At that time, lawmakers and advocates were advised by Division of Motor Vehicles staff that, due to a provision in the Constitution of West Virginia, the agency could not distribute any monies on vehicle registrations for any purposes other than construction and maintenance of roads. Thus, asking the DMV to administer the issuance of a wildlife license plate, including transferring part of the monies to a special fund to support the NWNHP, would require a constitutional amendment, the DMV contended.

Since legislators seemed receptive to the idea of a wildlife license plate, and because it seemed such a fitting and proactive way to support the NWNHP, and because other states had already established such license plates with great results, advocates decided to pursue the major step of obtaining permission to establish the plate via a constitutional amendment. With the particular support of House Speaker Chuck Chambers, the legislature passed Senate Joint Resolution 8, approving the amendment for inclusion on the ballot of the next general election. The major task of achieving voter approval remained.

In the summer of 1995, representatives from several conservation, environmental and sporting groups, including the West Virginia Audubon Council, the Sierra Club, the Bowhunters Association, and the West Virginia Wildlife Federation formed a coalition to achieve support of two wildlife-related amendments that would appear on the ballot in the November 1996 general election: Amendment 1 protected DNR revenues from being used for purposes other than wildlife conservation and management, and Amendment 2 allowed for the creation of the wildlife license plate.

Over the course of the 1996 election year, members of this coalition, called the Wildlife Conservation Alliance, undertook the major work of conducting a statewide political campaign to win voter approval of both amendments. Their activities included fund raising via telephone solicitation of members of targeted groups, letter appeals, and a raffle; production of signs, bumper stickers, brochures, press releases, and radio advertisements; presentations to conservation, business, and civic groups; participation on talk-radio programs; appeals to gubernatorial candidates for endorsement; and other strategies. The work of the Wildlife Conservation Alliance paid off in the form of a resounding victory, with more than 70 percent of some 628,000 voters approving each amendment.

In 1997, enabling legislation at W. Va. Code § 17A-3-14 was passed to confirm the details of how West Virginia's new wildlife license plate would be administered. After this required procedure, design and production of the plate began under the supervision of a small committee composed of two citizens (including Ms. McEntee) and staff members from the Division of Natural Resources and the Division of Motor Vehicles.

In June of 1998, in a ceremony at the Capitol jointly conducted by the DNR, the DMV, and the Governor's Office, West Virginia's wildlife license plate, featuring a male rose-breasted grosbeak and a Potomac Highlands background, was unveiled. Seven years after citizens first came together to seek a permanent funding source for the Nongame Wildlife and Natural Heritage Program, one was finally achieved. It should, perhaps, be noted that the wildlife license plate was considered an adequate funding source in conjunction with the NWNHP's general revenue appropriation. It was never anticipated that the license plate, by itself, would fully fund the program.

In the fiscal years 1999 and 2000, the first two years it was in place, the nongame wildlife plate raised \$217,915,000 and \$334,655, respectively, for conservation programs. At the time of trial in fiscal year 2001, the nongame plate had raised \$77,727. Additionally, in the future, such funding may qualify as state expenditures which earn "matching" federal payments under so-called CARA legislation,<sup>3</sup> the largest conservation appropriation and funding in American history, considered by the 106<sup>th</sup> Congress and carried over to the current Congress. Correspondingly, if matching funds are available, every dollar diverted away from nongame wildlife plates will, in fact, divert a multiple of itself away from state conservation efforts.

<sup>3</sup> CARA stands for Conservation and Reinvestment Act. See <http://www.teaming.com/proposed.htm>.

B. March 11, 2000 Legislative Authorization of "Race Theme" License Plates

In the legislative session for 2000, as a result of a proposal from a staff person at DMV, and without any market research indicating a popular desire for NASCAR plates, the West Virginia legislature amended Chapter 17A of the West Virginia Code to authorize the issuance of so-called "race theme" special registration plates displaying National Association for Stock Car Auto Racing copyrights, trademarks and logos. This legislation, codified at W. V. Code § 17A-3-14 (c) (18), provided in subsections (B) and (C) that all such funds received from the sale of race theme license plates:

[S]hall be deposited into a special revolving fund to be used in the administration of this chapter [17A].

W. V. Code § 17A-3-14 (c) (18)(B) and (C) (emphasis added).

C. DMV's September 1, 2000 "Sole Source" Contract With Race Plate Marketing

On or about September 1, 2000, Defendant DMV entered into a Limited License Agreement with Defendant Race Plate Marketing. Pursuant to the Limited Licensing Agreement, Defendant Race Plate Marketing permitted Defendant DMV to employ various trademarks and copyright works associated with NASCAR, NASCAR Teams and NASCAR Drivers on certain "Race Plates" which Defendant DMV plans to manufacture and sell to the public.

In exchange for the use of the licensed trademarks and copyright works, Defendant DMV agreed to pay Defendant Race Plate Marketing a "Licensing Fee," defined in paragraph O on page 2 of the Limited Licensing Agreement, Exhibit A to Defendant Race Plate Marketing's September 13, 2000 Motion to Dismiss (hereafter "Exhibit A") as:

[T]wenty-three percent of the Special Plate Fee when a Driver Specific Design Race Plate is sold, registered, renewed, sold as replacement, and/or distributed by the Agency

or

[E]leven percent of the Special Plate Fee when a Race Plate Marketing/NASCAR Specific Design Race Plate is sold, registered, renewed, sold as replacement and/or distributed by the Agency.

"Special Plate Fee" was defined in paragraph P on page 2 of Exhibit A as:

[T]he additional twenty-five dollar fee the Agency charges for a Race Plate, or the twenty-five dollar fee the Agency charges for a non-registration full size collectable plate.

Pursuant to the terms of a November 6, 2000 Licensing Agreement between DMV and NASCAR, Inc.,<sup>4</sup> DMV agreed to pay NASCAR a license fee equal to:

[F]ourteen percent (14%) of the Net Sales of NASCAR Specific Licensed Products

or

[T]wo percent (2%) of the Net Sales of NASCAR plus Driver Licensed Products.

As a result of the combined Race Plate Marketing and NASCAR, Inc. contracts, DMV agreed to pay a total of twenty-five percent (25%) of the revenues generated by any plate bearing either a NASCAR driver and NASCAR, Inc. logo, or simply the NASCAR, Inc. logo. The only difference in the payments on either plate was occasioned by the presence or absence of a NASCAR driver.

<sup>4</sup> The November 6, 2000 contract between DMV and NASCAR, Inc. was the subject of a separate lawsuit brought in the Circuit Court for Kanawha County on November 22, 2000. After a January 4, 2001 hearing on the Plaintiffs' Motion for Preliminary Injunction and the Defendants' Motion to Dismiss, Judge Zakaib on January 31, 2001 granted the Defendants' Motion to Dismiss on grounds of res judicata and collateral estoppel.

To illustrate, the following is a "Race Plate Marketing/NASCAR Specific Design Race Plate" (referred to as a "NASCAR Specific Plate" in the November 6, 2000 NASCAR, Inc Contract) (see: [http://www.wvdot.com/6\\_motorists/dmv/6g2d\\_nascarplates.htm#N](http://www.wvdot.com/6_motorists/dmv/6g2d_nascarplates.htm#N)).



DMV would charge the purchaser of this registration plate \$25 in addition to the usual registration fee. Of this \$25 premium, 25% (or \$6.25) would be distributed as follows: 11% (\$2.75) to Race Plate Marketing and 14% (\$3.50) to NASCAR, Inc.

The following is an illustration of a "Driver Specific Design Race Plate" (aka "NASCAR plus DRIVER") Plate:



The revenue splitting formula for this plate is as follows: DMV would charge the purchaser of this registration plate \$25 in addition to the usual registration fee. Of this \$25 premium, 25% (or \$6.25) would be distributed as follows: 23% (\$5.75) to Race Plate Marketing and 2% (\$.50) to NASCAR, Inc.

By the terms of its agreements with five different NASCAR drivers, an undisclosed amount of Race Plate Marketing's \$5.75 revenue share from the "Driver Specific Design Race Plate" is paid to the driver or team whose name and number appears on the plate.

DMV's September 2, 2000 licensing agreement with Race Plate Marketing, and the November 6, 2000 licensing agreement with NASCAR, Inc. apply the same distribution formula to \$25 in sales revenues charged purchasers of "commemorative" or "collectable" plates which may do not authorize the purchaser to drive a motor vehicle on the highway but have some apparent value as memorabilia.

D. The DMV's Defined "Administrative Costs" In The Legislative Note  
To The March 2000 Legislation To Exclude Payment Of Royalty Fees

At the October 2, 2000 trial, Richard Johnson, Director of Management Services at DMV since 1986, testified that he personally prepared a Legislative Note for use by the legislature incident to the passage of the so-called "race theme" license plate legislation. Mr. Johnson identified the document (Exhibit 1) as a document which identifies the impact of revenues and cost to the state and the DMV from the legislation. (Oct 2 Trans at 49). Page two of the legislative note included the statement that "cost of issue" would include "the cost of the plate and the administrative cost. The division estimates that these plates will cost \$5.00 to produce and \$5.00 to register." Mr. Johnson testified that cost of the plate represented sums paid to the bureau of prisons. (Oct 2 Trans 50).

Mr. Johnson also testified that he prepared a chart which demonstrated the flow of license plate revenues (Exhibit 2) and in response to questions acknowledged that the \$5.00 administrative cost listed on the flow chart was the same \$5.00 as the administrative cost on the legislative note. The \$5.00 administrative cost on both Exhibits 1 and 2 consisted of \$.33 postage, \$.12 for the cost of handling decals, and the balance of \$4.55 represented an allocation of personnel and overhead at DMV. (Oct 2 Trans at 53). The royalty payments to Race Plate Marketing were not included in the "administrative costs" listed in the legislative note, but were listed as separate items. (Oct 2 Trans at 80). Similarly, the flow chart states as a separate line item the license fees (a percentage of the gross revenues) paid to Race Plate Marketing.

Mr. Johnson claimed that "administrative cost" was not the same as "cost of administration" for purposes of Art. VI, § 52 of the West Virginia Constitution, but acknowledged that no document other than the legislative note and the flow chart admitted at trial documented his interpretation of the two items as separate concepts.

Q ..... Are you aware of any internal documents, any memorandum, any regulations or any policies, anything in writing prior to your testimony today that defines cost of administration in a manner different from the definition of administrative cost you gave in your deposition last Thursday?

A No, sir.

Q Between the time you gave your deposition last Thursday and today, has somebody explained to you that the definition of administrative cost that you gave on that day would cause you to lose the lawsuit?

A No, sir.

Q Has anybody suggested to you that you needed to give a cost of administration that was broader than the administrative cost?

A I've had discussions with the attorneys on it, yes.

Q Were you instructed to give a definition of cost of administration that was broader than administrative cost?

A No.

Q How did you come to that conclusion?

A Which conclusion?

Q The conclusion that cost of administration is broader than administrative cost?

A I drew up the fiscal note and we do these sometimes in great detail. We go down and itemize postage, envelopes, rent, and in this particular one I break it down according to the cost items. I break it down based on who's going to use it and, in this particular case our commissioner. He does not like a lot of detail that's itemized in here. I could have called it direct cost. I could have called it administration cost, I just happened to pick administrative cost.

Q And that administrative cost as you explained it in your deposition Thursday and again today, includes all of the overhead of the department and allocation of personnel salaries. Is that correct?

A Yes, administrative cost is everything.

Q That's right, administrative cost is everything?

A Yes.

Oct 2 Trans at 78.

Moreover, Mr. Johnson identified the nongame revenues paid to DNR pursuant to Art. VI, § 56, as a part of the "cost of administration" of DMV.

Q Mr. Johnson, I believe in response to Mr. Pullin's question relating to Plaintiff's Exhibit Number 2, you were asked to explain the \$15.00 annual non-game fee I believe, and Mr. Pullin asked that was in fact a cost of administration. I believe your answer was, yes. Is that correct?

A I think that was my answer, yes.

Q Are you aware that the DMV advised the proponents of making the payment -- or I should say the wildlife license plate, that they couldn't pass money over to the Department of Natural Resources for that purpose without amending the Constitution?

A I was not involved in that.

Q Are you aware that Section 52 of the Constitution which was in place already from 1941 forward, already authorized the payment of cost of administration; didn't it?

Q You're not aware of that?

A I'm not aware of that.

Oct 2 Trans at 70.

And, according to Mr. Stevens, payment of the NASCAR royalties was a "duty" of DMV because it was on an invoice and they had to pay invoices. Regarding a hypothetical invoice from the Department of Public Safety for State Police barracks, Mr. Stevens testified as follows:

Q You stated that your obligation to pay Race Plate Marketing was based upon on a contract and an invoice that may flow from it. If you got an invoice from the Department of Public Safety to pay for the barracks of the state police and the mere fact that it's on an invoice, mean it's a duty and you have to pay it?

A Yes, sir.

Oct 2 Trans at 79.

E. The DMV's Procurement of NASCAR Licenses Over "Lunch at Cagneys"

Warren Stevens, the Director of Vehicle Services at DMV for 18 months at the time of trial, and whose prior career included employment as a commercial pilot, identified himself as the source of the initial idea for a NASCAR license plate. Mr. Stevens testified that he had heard about a radio report similar plate sold by New York, had inquired of New York officials regarding their experiences.

Mr. Stevens testified that his efforts to identify NASCAR drivers or teams willing to license the use of their signatures and racing numbers (which were protected as copyrights and trademarks) consisted of four form letters, which he had retained no copies of (Oct 2 Trans at 137-138), and four follow up phone calls. Additionally, he spoke to a licensing agent at NASCAR, Inc. and made "several" other calls. (Oct 2 Trans at 139 and 144).

Mr. Stevens acknowledged that he did not place any ad requesting proposals from NASCAR teams or drivers in trade publications, and that there was no meeting at DMV at which a considered decision was made not to publish requests for proposals (Oct 2 Trans at 147-149). In response to a question regarding who inside the DMV made a determination that Race Plate Marketing was the "sole source" for NASCAR team or driver trademarks and copyrights, Mr. Stevens initially testified that Jill Bissett, the DMV General Counsel, made the determination. (Oct 2 Trans at 154), but later stated that he had made the determination (Oct 2 Trans at 180).

Mr. Stevens stated that he concluded Race Plate Marketing was the sole source for NASCAR driver and team logos based on representations from Race Plate Marketing and race teams (Oct 2 Trans at 171, 180). But he also acknowledged that he had not seen the Race Plate Marketing contracts with Robert Yates Racing, Inc. pertaining to two drivers, Dale Jarrett and Ricky Rudd (Exhibits 14 and 15) prior to trial, (Oct 2 Trans at 170) and did not know that the Race Plate Marketing territory excluded New York, with whom Robert Yates Racing, Inc. already had a licensing agreement (Oct 2 Trans at 172).

In response to a question from counsel for Race Plate Marketing, Mr. Stevens testified that he made a determination that Race Plate Marketing was the sole source for the NASCAR logos "in the package you wanted," to which he replied "Exactly." (Oct 2 Trans at 187). He later explained that the "package" meant he wanted to license the top six or seven teams and drivers in a single contract. (Oct 2 Trans at 190).

F. Race Plate Marketing Never Sold A Single License Plate Prior To  
DMV's Execution Of The September 1, 2000 "Sole Source" Contract.

Mr. Brant testified that he first met with Warren Stevens of the DMV in September or October 1999 (Oct 2 Trans at 97), at lunch in a restaurant in Charleston, W. Va. called

"Cagney's" and that they discussed Mr. Stevens' desire to license NASCAR logos for use on W. Va. motor vehicle registration plates (Oct 2 Trans at 98).

Robert Brant, the president of Race Plate Marketing, LLC, acknowledged that he is a full-time employee of B-Fast,<sup>5</sup> a motorsports marketing company owned by the estate of his brother, who died in the course of 2000 (Oct 2 Trans at 84), and that as of the October 2, 2000 trial date Race Plate Marketing had not made any sales or generated any income. (Oct 2 Trans at 85). Mr. Brant identified promotional literature for B-Fast (Exhibit 11) which stated that B-Fast had licensing agreements with major race car drivers, teams, tracks and NASCAR (Oct 2 Trans at 90) which allowed them to license their copyrights and trademarks on the sale of different products, including a stick shift and an umbrella. (Oct 2 Trans at 91).

Mr. Brant acknowledged that Race Plate Marketing did not exist at the time of his initial meeting with Mr. Stevens, and in fact did not come into existence until May 16, 2000, five days after the W. Va. legislature adopted amendments to W. Va. Code § 17A-3-14 authorizing the issuance of "race theme" license plates (Oct 2 Trans at 98). Mr. Brant also acknowledged that B-Fast, a company in existence in 1999 and at the time of trial in 2000, in fact was actively engaged in the NASCAR logo licensing business:

Q So, when you met in September of 1999, not only did Race Plate Marketing not have any rights, it didn't exist, did it?

A No, it didn't.

Q But some other entity known as B-Fast did. And B-Fast had already sold, at least to some antennae manufacturers and some stick shift marketers the rights to put various NASCAR logos, trademarks and copyrights on those products. Is that correct?

A Yes, sir we had relationships in the industry and had sold the rights.

<sup>5</sup> The trial transcript incorrectly lists Mr. Brant's employer as D-Fast.

Q Well, wouldn't it be fair to state that if someone were looking for a source of NASCAR copyrights and trademarks either in September of 1999 or in September of 2000 and they were doing that in West Virginia, even if they were looking at 190 Hart Road as their location which they were going to look at, both B-Fast and Race Plate Marketing are located there. Correct?

A Correct.

Q And Race Plate Marketing is not the sole distributor of NASCAR copyrights and trademarks even at 190 Hart Road, are they?

A I'm not sure I understand the question.

Q Well, there's at least one other business at 190 Hart Road that's in the business of selling copyrights and trademarks owned by NASCAR to other entities for use in their products other than Race Plate Marketing. In fact, there's B-Fast, Inc. Is that right?

MR. FUSCO: Objection for the use of the word sell. License, I'll accept. There's no evidence that anybody's sales.

MR. DEPAULO: I'll retract it and rephrase it say license.

A That's true.

Oct 2 Trans at 99-100.

Moreover, in the course of reviewing the market share of NASCAR memorabilia held by the persons from whom Race Plate Marketing had entered into sublicenses, Mr. Grant reaffirmed his company's total lack of market share:

Q All the signatures and logos that you described to us according to your testimony in response to Mr. Fusco, had a market share of 78 percent of the NASCAR memorabilia. Is that correct?

A Yes, sir.

Q What market share does Race Plate Marketing have?

A Zero.

Oct 2 Trans at 131.

Mr. Brant acknowledged that when he received the final August 28, 2000 draft of the contract signed on September 1, 2000, Race Plate Marketing did not have any signed agreement authorizing Race Plate Marketing to act as an the sole sub-licensor of NASCAR team or driver logos. (Oct 2 Trans at 93). Mr. Brant also acknowledged that two May 22, 2000 contracts with Robert Yates Racing, Inc. excluded New York from Race Plate Marketing's licensing territory. Mr. Brant further acknowledged that as of the trial date, October 2, 2000, some one month and one day after the execution of the September 1, 2000 contract with DMV, he did not have a signed contract with Dale Earnhardt, Inc. or the other two NASCAR teams and drivers whose logos appeared on DMV license plates.

In short, on the date of execution of the September 1, 2000 "sole source" contract, Race Plate Marketing was the proprietary owner of one item only – the illustration which it had developed itself (Oct 2 Trans at 126) which consisted of several waving colored lines plus a black and white checkered flag (Oct 2 Trans at 128), and which was used as a background for the proprietary trademarks and copyrights of others, and which were only relicensed by Race Plate Marketing. (Oct 2 Trans at 128-130).

No plate is offered for sale by DMV which displays only this proprietary logo of Race Plate Marketing alone; the race theme plates all offer either: (a) NASCAR, Inc logos in addition to the Race Plate Marketing logo, or (b) NASCAR, Inc. plus one of five different individual NASCAR driver or team logos in addition to the Race Plate Marketing logo.

Plaintiffs were prepared to concede that Race Plate Marketing had one "sole source" arrangement:

Q Okay but there was one thing that you had from September 1999 forward, total lock on, and that was Warren Stevens ear.

MR. PULLIN: I am going to object to that. There's no evidence of that. That's defamatory.

MR. DEPAULO: That's a question.

THE COURT: That's a question and he can answer it.  
Overruled.

A I had a professional relationship with Mr.  
Stevens relative to the development of this project.

Oct 2 Trans at 106.

G. The "NASCAR Thunder" Store At The Charleston Town Mall, On The Day Of Trial,  
Sold License Plates Bearing The Exact Same NASCAR-Related Driver Trademarks As  
Those Covered By The "Sole Source" Contract With Race Plate Marketing.

Mr. Brant testified that he spent a considerable amount of time putting together the various rights collected in the September 1, 2000 contract, and that the same amount of time expended by Mr. Stevens would not have resulted in a successful procurement. His expertise was necessary, Mr. Brant stated, because NASCAR was a close knit community and taking NASCAR logos into the area of license plates was new.

Q And you described, I believe, NASCAR as a popular sport. You said that there was, I may not use the exact phrase, but you said something of a close net family and they inundated with new products. I took it at least from your comment, that that's part of what made it difficult for a newcomer to penetrate into the inter circle. Is that fair? Did I understand what you're saying correctly?

A That's fair.

Q Pardon me?

A Yes, sir that's right.

Q And license plates would be a new, if you will, media or vehicle for NASCAR as a new market. The fact that it's new, it's part of what would make it harder to penetrate. Is that correct?

A I guess.

\* \* \* \* \*

Q Do I understand from your testimony that placing NASCAR copyrights and trademarks on license plates, that was a new adventure. Is that correct?

A That would be, yes.

Q And that's what required the expertise, if you will, or the seasoned experience of someone like yourself. Is that correct?

A Yes.

Oct 2 Trans at 120-121.

At the October 2, 2000 trial, counsel for Petitioners proffered as evidence several license plates which Petitioner Sheila McEntee had purchased at lunch from the “NASCAR Thunder” store at the Charleston Town Mall, approximately one block from the Kanawha County Circuit Court where the trial of this matter was proceeding.

The commemorative license plates bore the same signatures as those covered by the September 1, 2000 “sole source” license agreement with Race Plate Marketing and also included the same numbers, for which NASCAR teams and drivers apparently have successfully obtained trademark and copyright protection.

The commemorative plates were offered for the proposition that the claimed difficulty of obtaining such licenses by DMV was grossly overstated – since they were obviously available at a NASCAR memorabilia store -- and that the additional proposition that Race Plate Marketing’s claim to be the sole licensee of NASCAR related team and driver copyrights, including the specific market for license plates, was demonstrably false.

Counsel for Race Plate Marketing stipulated that the commemorative plates proffered by Petitioners “are in fact licensed NASCAR products but we challenge their relevancy in this proceeding since they are not vehicle registration plates but rather novelty plates.” (Oct 2 Trans at 194). However, Judge Stucky's October 5, 2000 Order explicitly found that the September 1,

2000 contract applies to the sale of commemorative plates, and that contract plainly provides for the payment of royalty fees on sales of such plates.

Petitioners pointed out that the state already had authority to issue registration plates before DMV entered into its September 1, 2000 contract with Race Plate Marketing. Plainly, the only thing additional the state obtained in that agreement was the right to use copyrights and trademarks of NASCAR-related drivers, the same drivers whose logos appeared on the plates purchased at lunch from the "NASCAR Thunder" store at the Charleston Town Mall.

In response to Counsel for DMV's objection that the witness could not establish the source of the license to use the NASCAR logo on the novelty plates, counsel for Petitioners pointed out that the assertion of copyright was stamped on the plates themselves, as is typical of every assertion of copyright in the United States. The Court observed that "It's on but it doesn't make it true...if I want to forge it, I can forge it." (Oct 2 Trans at 199). Petitioners counsel suggested to the Court that the stamped copyright was prima facie evidence of the copyright, and that it was Respondents burden to prove the copyrights were counterfeit (which counsel for Race Plate Marketing had already stipulated were valid). The Court excluded the exhibits but permitted counsel to make a proffer. (Oct 2 Trans at 202, 206-208).

#### **IV. ASSIGNMENTS OF ERROR**

A. May DMV evade voter imposed Constitutional mandates on government spending by characterizing its 75% - 25% division of the excess revenues from the sale of NASCAR license plates as a "cost of administration" of DMV?

B. Was Race Plate Marketing the "sole source" for NASCAR-driver copyrights and trademarks, and therefore exempt from the state purchasing requirements for competitive bidding in 148 C.S.R. § 148-1-7, when:

1. the State Purchasing Manual, in § 8.1.6 excludes from the definition of "unique and not available from other sources" in 148 C.S.R. § 148-1-7, 7.5 (b), products or services manufactured by one company but sold through distributors, and the NASCAR copyrights and trademarks at issue here are the proprietary intellectual property of third parties, and Race Plate Marketing is merely a sub-licensee that re-licenses the copyrights and trademarks to the DMV, and

2. the only efforts employed by the DMV to obtain the copyrights and trademarks through "ordinary purchasing procedure" for purposes of 148 C.S.R. § 148-1-7, 7.5 (a), consisted of one telephone call to NASCAR, Inc. and four letters and phone calls to a NASCAR driver team.

## **V. POINTS AND AUTHORITIES.**

A. Highway Trust Fund Provisions of W. Va. Constitution, Article VI, Section 52

This Court has construed the provisions of Article VI, § 52 of the West Virginia Constitution consistently with a clear recognition that it is the voice of the people. The inquiry in each case will be whether the legislature, the executive, or a judicial officer is attempting to evade or otherwise side-step constitutionally mandated controls on the uses and ends to which the voters' money is placed. And that mandate will not be avoided by the use of what this Court has characterized as "recondite" language.

In the present case, the DMV has attempted to distinguish between "administrative costs" – which it concedes does not encompass a revenue sharing device with Race Plate Marketing – and "cost of administration" – which by the magical invocation of a preposition it would eviscerate a half century of voter imposed controls on government spending.

In 1941, the citizens of the State of West Virginia adopted Article VI, § 52 of the West Virginia Constitution, entitled " Revenues Applicable to Roads," which established a highway

trust fund out of the revenues collected from license taxation, gasoline taxes and vehicle registration. The terms of the trust fund limit the expenditures of trust funds to matters related directly to the construction of highways, including the cost of administration of the Division of Motor Vehicles. Article VI, § 52 provides specifically that:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deduction of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.

W. Va. Const., Art. VI, § 52 (emphasis added).

B. Constitutional Exception to Highway Trust Funds for Nongame Wildlife Plates

The sole exception to the requirement of Article VI, § 52 of the West Virginia Constitution is the provision in § 56, Article VI, entitled "Revenues applicable to nongame wildlife resources in the state." This constitutionally mandated exception to the trust fund provisions of Article VI, § 52, was adopted by the citizens of the State of West Virginia in a vote held in 1996. Fully 74% of the voting public supported the narrowly crafted exception to the

Article VI, § 56 while making direct reference to § 52, explicitly provides that:

Notwithstanding any provision of section fifty-two of article six of this Constitution, the Legislature may, by general law, provide funding for conservation, restoration, management, educational benefit and recreational and scientific use of nongame wildlife resources in this state by providing a specialized nongame wildlife motor vehicle registration plate for motor vehicles registered in this state. The registration plate shall be issued on a voluntary basis pursuant to terms and conditions provided by general law for an additional fee above the basic registration and license fees and costs otherwise dedicated to the road fund. Any moneys collected

from the issuance of these specialized registration plates in excess of those revenues otherwise dedicated to the road fund shall be deposited in a special revenue account in the state treasury and expended only in accordance with appropriations made by the Legislature as provided by general law for the conservation, restoration, management, educational benefit and recreational and scientific use of nongame wildlife resources in this state. All moneys collected which are in excess of the revenues otherwise dedicated to the road fund shall be deposited by the state treasurer in the "nongame wildlife fund" created especially for nongame wildlife resources in this state.

Resolved further, That in accordance with the provisions of article eleven, chapter three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, such proposed amendment is hereby numbered "Amendment No. 1" and designated as the "Nongame Wildlife and Natural Heritage Revenue Amendment" and the purpose of the proposed amendment is summarized as follows: "To require that revenue funds accruing from the sales of all specialized nongame wildlife motor vehicle registration plates which are in excess of revenues otherwise dedicated to the road fund shall be expended solely for the management, restoration, conservation, educational benefit, and recreational and scientific use of nongame wildlife resources of the state and for no other purposes."

W. Va. Const., Art. 6, § 56 (emphasis added).

W. V. Code § 17A-3-14, entitled "Special nongame wildlife registration plates" implements the exception to the highway trust fund for nongame wildlife license plates by providing for the deposit of all funds in excess of the normal license plate fee to be deposited in an account for the benefit of wildlife and the use of the Department of Natural Resources, as follows:

(A) Upon appropriate application, the division shall issue a special registration plate displaying a species of West Virginia nongame wildlife no later than the first day of January, one thousand nine hundred ninety-eight. This special plate shall display a species of nongame wildlife native to West Virginia as prescribed and designated by the commissioner and the director of the division of natural resources.

(B) An annual fee of fifteen dollars shall be charged for each special nongame wildlife registration plate in addition to all other fees required by this chapter. All annual fees collected for nongame wildlife registration plates shall be deposited in a special revenue account designated the nongame wildlife fund and credited to the division of natural resources.

(C) A special one-time initial application fee of ten dollars shall be charged in addition to all other fees required by this chapter. All initial application fees collected by the division shall be deposited in a special revolving fund to be used in the administration of this chapter.

WV ST § 17A-3-14.

DMV's payment of royalties to Race Plate Marketing is not even remotely a part of the cost of administration of the DMV. As a result, the payments required by the Licensing Agreement violate the statutory provisions of W. V. Code § 17A-3-14 (c)(18)(B) and (C) which unambiguously limits the use of the funds to the "cost of administration of this chapter." To the extent that the language of W. V. Code § 17A-3-14 (c)(18)(B) and (C) tracks the "cost of administration" language of W. V. Constitution, Article VI, § 52, decisions of the W. Va. Supreme Court of Appeals construing the Constitutional provision are germane.

The West Virginia Supreme Court has upheld the DMV's payment of costs *directly* related to road construction and maintenance -- such as the cost of patrolling the state highways by state police -- but struck down, as violative of the provisions of W. Va. Const. Art. 6, § 52, costs only *remotely* related to road construction and maintenance -- such as the cost of barracks for state policemen. In Syllabus Point 1 of *Contractors Ass'n of West Virginia v. West Virginia Dept. of Public Safety, Div. of Public Safety*, 434 S.E.2d 357, 189 W.Va. 685 (W.Va. 1993), the Supreme Court of Appeals held:

The only purposes for which the funds described in W.Va. Const. art. VI, § 52 may be spent are for the "cost of administration and collection" and for the cost of "construction, reconstruction, repair and maintenance of public highways." **The term "cost of administration" includes the cost of administering the duties of**

**the Division of Motor Vehicles.** The term "maintenance" includes the following activities which are directly related to ensuring the safety of our public highways: the road patrol, traffic, and traffic court activities of the Department of Public Safety; and the motorcycle safety and licensing program, but the term "maintenance" will not be construed to include activities which are remotely connected to highway safety such as the construction and operation of police barracks.

434 S.E.2d 359 (emphasis added).

## **VI. CONCLUSION**

In the present case, DMV's payment of royalties to Race Plate Marketing is neither directly nor remotely related to the "construction, reconstruction, repair and maintenance of public highways" nor may such payments plausibly be characterized as part of the "cost of administration" of the DMV. Thus, the payments contemplated by the Limited Licensing Agreement violate the explicit provisions of the enabling legislation. Should the language of the statute for any reason be considered not to bar the payments contemplated by the Licensing Agreement, they nonetheless violate the provisions of W.V. Constitution, Article VI, § 52.

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