

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION AND DIVISION  
OF HIGHWAYS,

2016 DEC -5 PM 12:40

CATHY S. SWINCHILLERK  
KANAWHA COUNTY CIRCUIT COURT

**Plaintiff,**

v.

**Civil Action No.: 16-C-1561  
Hon. Louis H. "Duke" Bloom**

WEST VIRGINIA PAVING, INC.,  
SOUTHERN WEST VIRGINIA PAVING, INC.,  
SOUTHERN WEST VIRGINIA ASPHALT, INC.,  
KELLY PAVING, INC., CAMDEN  
MATERIALS, LLC, AMERICAN  
ASPHALT & AGGREGATE, INC.,  
AMERICAN ASPHALT OF WEST  
VIRGINIA, LLC, BLACKTOP  
INDUSTRIES AND EQUIPMENT COMPANY,  
AND JOHN AND JANE DOES 1-25,

**Defendants.**

**WVP DEFENDANTS' MOTION TO DISMISS**

Defendants West Virginia Paving, Inc.; Southern West Virginia Paving, Inc.; Southern West Virginia Asphalt, Inc.; and Camden Materials, LLC ("WVP Defendants"), by counsel, hereby bring this motion to dismiss. Plaintiff, West Virginia Department of Transportation and its Division of Highways ("DOH"), purports to bring this action on behalf of the State of West Virginia and its people. However, DOH lacks the authority to do so. Actions on behalf of the State and its people must be brought by and with the approval of the State's constitutionally appointed lawyer, the Attorney General of West Virginia, who must represent the State in all litigation. DOH does not have the authority, independent of the Attorney General, to bring these claims or hire outside counsel to do so on its behalf. The West Virginia Antitrust Act specifically requires that claims made on behalf of the State must be brought by and through the Attorney General. While there is a bidding process whereby private attorneys may be engaged to serve on behalf of the

Attorney General, DOH has entirely sidestepped that process. For these reasons, the claims purportedly asserted by DOH on behalf of the State and its people are in fact a legal nullity and, as a matter of statutory and constitution law, should be dismissed.

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## I. FACTS

On October 12, 2016, the Cities of Charleston, Beckley, Bluefield, and Parkersburg each brought their own separate class action complaints. Each action is separate, and each action is filed in its own respective county. Each Plaintiff in each of these cases is represented by the same private attorneys. Shortly thereafter on October 14, this present action was filed. On October 20 and 21, the Kanawha County Commission and the City of Huntington brought their own class action complaints. The same private attorneys also represent each of these Plaintiffs, as well. All of these complaints contain substantively identical allegations.<sup>1</sup>

<i>Style</i>	<i>Date</i>	<i>Circuit Court</i>	<i>Case No.</i>	<i>Judge</i>
City of Charleston v. West Virginia Paving, Inc., <i>et al.</i>	10/12/16	Kanawha	16-C-1552	Kaufman
City of Beckley v. West Virginia Paving, Inc., <i>et al.</i>	10/12/16	Raleigh	16-C-661-B	Burnside
City of Bluefield v. West Virginia Paving, Inc., <i>et al.</i>	10/12/16	Mercer	16-C-337-DS	Swope
City of Parkersburg v. West Virginia Paving, Inc., <i>et al.</i>	10/12/16	Wood	16-C-425	Reed
West Virginia Department of Transportation and Division of Highways v. West Virginia Paving, Inc., <i>et al.</i>	10/14/16	Kanawha	16-C-1561	Bloom
Kanawha County Commission v. West Virginia Paving, Inc., <i>et al.</i>	10/20/16	Kanawha	16-C-1598	Stucky
City of Huntington v. West Virginia Paving, Inc., <i>et al.</i>	10/21/16	Cabell	16-C-666	Hustead

This DOH case, however, is unique. It is not a class action complaint like all of the others. Rather, DOH brings its claims against the Defendants in its own right, on behalf of all other State agencies, and as *parens patriae* for agencies and individual citizens. Clearly, this action is meant to be brought by the State *qua* state, doing only things that a sovereign State can do. Yet, the Attorney General—the State’s constitutionally appointed and democratically elected lawyer—

<sup>1</sup> While the same text appears to be copied and pasted across all actions, each Plaintiff is in its own market and, therefore, these actions do not arise from the same transaction or occurrence. *See* Defs.’ Resp. to Pl.’s Mot. Consol.

appears nowhere in this Complaint. As explained below, this constitutes a fatal flaw. DOH cannot, on its own, bring the State's claims without using the State's lawyer. Moreover, private attorneys cannot act as the State's outside counsel without permission from "the State's chief legal officer." *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 31–32, 569 S.E.2d 99, 107–08 (2002). Given these significant deficiencies, DOH has no authority to bring these claims. This renders the Complaint a legal nullity. Accordingly, this case should be dismissed.

## II. ARGUMENT

Neither the Attorney General nor any deputy is mentioned anywhere in the Complaint, much less listed as counsel of record. By all appearances, the Attorney General is playing no role in this litigation whatsoever, despite the fact that DOH purports to act on behalf of the State, its agencies, and as *parens patriae*.

The Attorney General is the State's constitutionally appointed and democratically elected counsel. Any action brought on behalf of the State or any of its agencies is constitutionally and statutorily required to be brought by the Attorney General him- or herself. Outside counsel may also represent the State in conjunction with the Attorney General, but only after being appointed as a special assistant attorney general through a mandatory bidding process that has not occurred here. In the face of this clear constitutional and statutory authority, DOH instead relies on three statutes that are wholly unavailing. Not only are these statutes inapposite, but they in fact further demonstrate the impropriety of DOH's suit. Because of these fatal defects, DOH's conduct is *ultra vires*, thus rendering the Complaint a legal nullity.

### ***A. Representation in litigation is a core constitutional function that must be performed by the Attorney General.***

The constitutional provisions regarding the Attorney General are limited, yet critical:

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and *attorney general*, who shall be, *ex officio*, reporter of the court of appeals . . . . They shall reside at the seat of

government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and *shall perform such duties as may be prescribed by law*.

W. Va. Const. art. 7, § 1 (emphases added). Surprisingly, this is the full extent of the Constitution's discussion of the Attorney General's powers. Of particular importance, however, is the final clause stating that his or her duties "may be prescribed by law," which, "when used in constitutions, generally mean[s] prescribed or provided by statutes." *Lawson v. Kanawha Cty. Court*, 80 W. Va. 612, 618, 92 S.E. 786, 789 (1907). Thus, the Legislature plays a key role in delineating the outer boundaries of the Attorney General's duties. Nevertheless, the Court has held that there "are certain core functions of the Office of the Attorney General that are inherent in the office of which the Office of Attorney General may not be deprived, and which may not be transferred to or set up in conflict with other offices." *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 31, 569 S.E.2d 99, 107 (2002). While the Legislature can, at times, tinker around the edges of the Attorney General's duties and allow agencies to hire their own staff attorneys for limited purposes, there are certain fundamental, constitutional powers that belong *only* to the Attorney General and to the exclusion of all others. "[P]ursuant to Article VII, Section 1 of the West Virginia Constitution, the Attorney General of the State of West Virginia is the State's chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities." *Id.* at 31–32, 569 S.E.2d 107–08 (italics omitted).

The Court delineated three of these essential core functions that cannot be changed by any legislation or statute; the list, which does not purport to be exhaustive, includes the powers

(1) to play a central role in the provision of day-to-day professional legal services to State officials and entities in and associated with the executive branch of government;

(2) to play a central role in *ensuring that the adoption and assertion of legal policy and positions by the State of West Virginia and State entities, particularly before tribunals, is made only after meaningful consideration of the potential*

*effects* of such legal policy and positions on the full range of State entities and interests;

(3) to assure that a *constitutional officer who is directly elected by and accountable to the people may express his legal view on matters of State legal policy generally and particularly before tribunals where the State is a party.*

*Id.* at Syl. Pt. 4 (emphases added). As the Court's syllabus point makes clear, the Attorney General's role is all the more important in the realm of litigation, so much so that

*In all instances when an executive branch or related State entity is represented by counsel before a tribunal, the Attorney General shall appear upon the pleadings as an attorney of record;* however, this requirement does not bar other counsel from also appearing and acting in a legal capacity for the State entity.

*Id.* at Syl. Pt. 7 (emphases added). Thus, one of the inviolable powers and duties of the Attorney General is the representation of the State before a tribunal such as this Court. This power is peculiar to and reserved solely for the Attorney General him- or herself and of which the Attorney General, as a constitutional matter, cannot be dispossessed.

Thus, any time the State or any of its executive agencies is represented before a tribunal without the Attorney General's involvement or blessing, these constitutional principles are implicated and indeed violated. *See id.* The Supreme Court has stated that when an agency hires outside counsel without involving the Attorney General, it "is arguably statutorily<sup>2</sup> and constitutionally offensive." *Id.* at 40 n.25, 596 S.E.2d 116 n.25. This was not directly at issue in the case, so the Court stopped just short of determining such a practice unconstitutional.

Given the Court's holdings regarding the Attorney General's core functions, it is unclear how such a practice could be constitutional, particularly in this case. Here, DOH has hired outside private counsel to file a suit alleging claims on behalf of the agency, on behalf of all other State

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<sup>2</sup> The Court noted that West Virginia Code § 5-3-2 "discourages that practice" of an agency hiring its own outside counsel, but this was before the passage of West Virginia Code § 5-3-3a which definitively prohibits it. *See* W. Va. Code § 5-3-3a (requiring all contracts, including contingency fee arrangements, be approved by the Attorney General and subjected to a mandatory bidding process). While unclear at that time, it is now evident that such a practice—which was used here—is "statutorily . . . offensive." *See ante* Part II.C.

agencies, and in a way in which only a state can act: as *parens patriae*, “in its capacity as provider of protection to those unable to care for themselves.” *Parens patriae*, Black’s Law Dictionary (abr. 9th ed. 2010). This case is a perfect Constitutional example of a situation when the Attorney General must be involved. Continuing this lawsuit without his involvement is plainly unconstitutional.

***B. By statute, the Attorney General must represent the State and its agencies in litigation.***

Unsurprisingly, the West Virginia Code requires the Attorney General’s involvement, as well.

*The Attorney General shall give written opinions and advice upon questions of law, and shall prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so, in writing, by the Governor, the Secretary of State, the Auditor, . . . the Commissioner of the Division of Highways, . . . , or any other state officer, board or commission, or the head of any state educational, correctional, penal or eleemosynary institution; and it is unlawful from and after the time this section becomes effective for any of the public officers, commissions, or other persons above mentioned to expend any public funds of the State of West Virginia for the purpose of paying any person, firm, or corporation for the performance of any legal services . . . .*

W. Va. Code § 5-3-1 (emphasis added). While it is unclear at this point whether DOH has unlawfully paid its private counsel with any public funds, it is clear that DOH has improperly engaged outside counsel without involving the Attorney General in the process. Omitting the Attorney General from the process is a fatal omission because representing the State and its agencies in litigation is within the particular province of the Attorney General.

The Attorney General shall appear as counsel for the state in all causes pending in the Supreme Court of Appeals, or in any federal court, in which the state is interested; *he shall appear in any cause in which the state is interested that is pending in any other court in the state*, on the written request of the Governor [and] *he shall institute and prosecute all civil actions and proceedings in favor of or for the use of the state* which may be necessary in the execution of the official duties of any state officer, board or commission on the written request of such officer, board or commission . . . .



W. Va. Code § 5-3-2 (emphases added). The Attorney General is the State's lawyer in all matters, but particularly when the State requires representation before a court. "[T]he Attorney General remains the legal representative of the State and its agencies unless specifically exempted by statute." *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 54, 385 S.E.2d 646, 650 (1989).

There is no statute that provides an exemption for DOH to bring these claims or to hire outside private counsel without the Attorney General's involvement. The only statute that touches on the subject is West Virginia Code § 17-2A-7.

Notwithstanding any law to the contrary, the commissioner:

(1) Shall select and employ a competent legal staff adequate for the ordinary legal services required by him and shall provide therefor such quarters, equipment, facilities, services and stenographic and other personnel as may be necessary;

(2) May call upon the *attorney general* and the prosecuting attorneys of the several counties, within their respective jurisdictions, for legal assistance and services as provided by law;

(3) May *employ such additional legal counsel* as he deems necessary upon a reasonable fee basis *to perform legal services in acquiring, by right of eminent domain* or otherwise, property, or an estate, right or interest therein.

(emphases added). This provision lays out the three options that DOH has for legal representation:

(1) staff attorneys for "ordinary legal services"; (2) the Attorney General and county prosecuting attorneys as provided by law, which is the constitutional and statutory default; and (3) outside attorneys for eminent domain actions. This third option is *only* for eminent domain actions. "[T]he express mention of one thing implies the exclusion of all others." *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) ("Expressio unius est exclusio alterius . . . is a well-accepted canon of statutory construction."). Further, as described above, the constitutional

and statutory default and a “specific[] exempt[ion] by statute” is necessary to deviate from this.<sup>3</sup>  
*Caryl*, 182 W. Va. at 54, 385 S.E.2d at 650.

***C. Outside counsel can only be appointed through a mandatory bidding process that DOH has shirked.***

While the Attorney General must always represent the State and its agencies in litigation, “this requirement does not bar other counsel from also appearing and acting in a legal capacity for the State entity.” Syl. Pt. 7, *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002). Indeed, there is a specific statutory process by which a private practice lawyer can become appointed special assistant attorney general. “The state may not enter into any contingency fee legal arrangement or contract with a private attorney” unless the Attorney General first makes a written determination of its necessity. W. Va. Code § 5-3-3a(b). Then, the Office of the Attorney General conducts a competitive public bidding process to determine the best choice of counsel for the State. *Id.* at (c) through (e). Only after this mandatory process may outside counsel represent the State as special assistant attorneys general.

None of these compulsory procedures were employed here.

***D. DOH relies on unavailing statutes.***

DOH cites three statutes to support its action: West Virginia Code §§ 47-18-8, -9, and 17-2A-8. *See* Compl. at ¶¶ 1 & 22. The first two are antitrust provisions that permit *the Attorney General* to bring antitrust claims on behalf of the State and its agencies. It does not permit agencies to act independently and hire their own outside counsel for such claims. The third provision that DOH cites similarly fails to provide the authority for DOH to bring and maintain this litigation.

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<sup>3</sup> Though not at issue here, even the validity of this statutory exception is suspect. In *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002), the Supreme Court of Appeals discussed the practice of state agencies hiring their own outside counsel independent of the Attorney General. This specific practice was not at issue in the case, so the Court stopped short of definitively deciding the issue. Yet, it still went out of its way to describe the practice as “statutorily *and constitutionally* suspect.” *Id.* at 40 n.25, 569 S.E.2d at 116 n.25.

1. *The West Virginia Antitrust Act requires the Attorney General to bring claims on behalf of the State.*

The first statute upon which DOH relies is West Virginia Code § 47-18-8, which reads:

*“The attorney general* may institute proceedings to prevent and restrain violations of the provisions of this article.” (emphases added). The provision does not provide other agencies acting independent of the Attorney General to bring their own claims.

The second statute upon which DOH relies is West Virginia Code § 47-18-9. Not only does it fail to provide a basis for an agency to sue, it *prohibits* any agency from suing without the Attorney General.

Any person who shall be injured in his business or property by reason of a violation of the provisions of this article may bring an action therefor . . . .

The State and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section. *The attorney general may bring an action on behalf of this State, or any of its public agencies*, counties, municipalities or other political subdivisions to recover the damages provided for by this section or provision of federal law; Provided, that this shall not impair the authority of any such county, municipality or other political subdivision to bring such action on its own behalf.

(emphases added). This code provision provides the general private right of action for antitrust claims to “[a]ny person,” which is defined to include “[t]he State and any of its political subdivisions and public agencies,” like DOH. *Id.* The Attorney General may bring proceedings on behalf of the State or any of its *“public agencies*, counties, municipalities or other political subdivisions.” *Id.* (emphasis added). It also includes the proviso a “county, municipality or other political subdivision” still has authority to bring its own claims itself. This presumes that the statutory person conspicuously left off the list—“public agencies,” like DOH—does *not* have authority to bring its own claims, at least not without the Attorney General as described in the preceding sentence. *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) (“*Expressio unius est exclusio alterius* . . . is a well-accepted canon of statutory construction.”).

The fact that “public agencies” was left out of that proviso speaks volumes and indicates that DOH, in fact, does not have authority to bring antitrust actions without the Attorney General.

2. *The DOH statute does not allow DOH to independently bring claims or hire outside counsel.*

The third and final statutory provision that DOH cites for support also fails. It is simply the general list of the powers of the Commissioner of Highways (“Commissioner”), DOH’s chief executive officer. *See also* W. Va. Code § 17-2A-8 (describing the roles DOH and the Commissioner such that the terms are interchangeable). Presumably, the provision upon which the Complaint relies is subsection 23:

In addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may: . . . [i]nvoke any appropriate legal or equitable remedies to enforce his or her orders, to compel compliance with requirements of law and to protect and preserve the state road and highway system or any part of the system

W. Va. Code § 17-2A-8(23). This provision, however, makes no mention of the Commissioner’s and DOH’s legal representation in such actions. It does, however, stipulate that the only legal or equitable claims that it may raise are those that are “appropriate.” As described above, an agency raising claims without the Attorney General is constitutionally and statutorily *inappropriate*.

The Code provision that DOH does *not* cite is even more important. The preceding section specifically lays out DOI’s options for legal counsel: it may use (1) staff attorneys for routine matters; (2) the Attorney General and county prosecutors “as provided by law”; and “additional legal counsel,” but only for eminent domain actions. W. Va. Code § 17-2A-7; *see also supra* Part II.B. (the inclusion of eminent domain actions presumes the exclusion of all others). None of these options are used here: DOH is not being represented by its staff attorneys; it is not being represented by the Attorney General or a county prosecutor; and this is not an eminent domain action. Thus, this Code provision fails to support DOH’s authority to bring this lawsuit without the Attorney General.

***E. DOH's conduct is ultra vires and without any legal authority, which renders this Complaint a legal nullity.***

To whatever extent DOH purported to “hire” outside litigation counsel for this matter, such engagement is improper for the constitutional and statutory reasons outlined above. Further, to whatever extent DOH purports to bring these claims without the Attorney General, the filing of the Complaint itself was also in violation of the constitutional and statutory provisions. Thus, without the Attorney General, DOH has no lawful authority to hire outside counsel or to assert these claims.

West Virginia law is clear that ultra vires, unauthorized actions undertaken by public officials are null and void and cannot bind the State or public body itself. In a line of cases nearly as old as the State itself, the Supreme Court of Appeals has consistently held that ultra vires public acts are “generally, if not always, void in toto.” *Exch. Bank v. Cty. of Lewis*, 28 W. Va. 273, 295 (1886). *See also, e.g., Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 58, 174 S.E.2d 318, 325 (1970) (“The trial court correctly held that the action of Warden M. Lane in making and executing the lease was without legal authority, ultra vires and void.”); *Cunningham v. Cty. Court*, 148 W. Va. 303, 310, 134 S.E.2d 725, 729 (1964) (“A governmental unit is not estopped to deny the validity of ultra vires acts of its officers.” (citing cases and authorities therein)). *Curry v. Kenova*, 112 W. Va. 241, 244, 164 S.E. 249, 250–51 (1932) (“[W]hen the city exceeded its power and made an illegal assessment, its act was ultra vires, unenforceable and void to that extent.” (citations omitted)); *West v. Ralston*, 48 W. Va. 170, 183, 36 S.E. 446, 452 (1900) (“It would be an ultra vires and void act, not binding on the public.”); *Wood v. Hinton*, 47 W. Va. 645, 649, 35 S.E. 824, 825–26 (1900) (“It is beyond the power of the town council to contract away the authority to prevent or abate nuisances, and, if they should do so, their acts are ultra vires null and void, and the town is not bound thereby . . .”).

“The state is not bound by the unauthorized or illegal acts of its officers . . . and all persons who deal with such officers do so at their peril, in all matters wherein such officers exceed their legitimate powers.” Syl. Pt. 3, *Totten v. Nighbert*, 41 W. Va. 800, 24 S.E. 627 (1896). *See also Armstrong Prods. Corp. v. Martin*, 119 W. Va. 50, 53, 192 S.E. 125, 127 (1937) (quoting *Totten* and collecting similar cases). “This rule is indispensable to guard the public against loss and injury from the fraud, mistake or rashness and indiscretion of their agents.” *State v. Chilton*, 49 W. Va. 452, 456, 39 S.E. 612, 613 (1901) (internal citations and quotations omitted).

As demonstrated above, DOH bringing this suit without the Attorney General’s involvement violates directly applicable statutes and, indeed, constitutional principles. DOH has no legal authorization to hire outside counsel. In this sense, the State has not actually or lawfully appeared in this case, nor has it asserted any claims. Thus, these are claims for which relief cannot be granted pursuant to Rule 12(b)(6). Further, DOH purports to bring this action on behalf of itself and the State. It has no standing to do so. Thus, this Court lacks subject matter jurisdiction pursuant to Rule 12(b)(1).

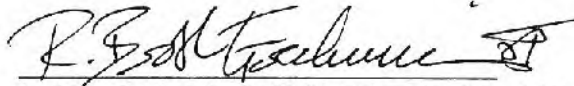
### **III. CONCLUSION**

DOH has no statutory authority to hire outside counsel and file lawsuits on its own and without the State’s constitutionally appointed and democratically elected lawyer, the Attorney General. Not only is DOH not statutorily authorized, it is in fact statutorily and constitutionally barred as well. As such, this Complaint is fatally flawed and indeed a legal nullity. Accordingly, it should be dismissed in its entirety.

Respectfully submitted,

**WEST VIRGINIA PAVING, INC.; SOUTHERN  
WEST VIRGINIA PAVING, INC.; SOUTHERN  
WEST VIRGINIA ASPHALT, INC.; AND  
CAMDEN MATERIALS, LLC**

*By counsel*



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Southern West Virginia Asphalt, Inc.;  
and Camden Materials, LLC*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION AND DIVISION  
OF HIGHWAYS,

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CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

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ASPHALT & AGGREGATE, INC.,  
AMERICAN ASPHALT OF WEST  
VIRGINIA, LLC, BLACKTOP  
INDUSTRIES AND EQUIPMENT COMPANY,  
AND JOHN AND JANE DOES 1-25,

Defendants.

CERTIFICATE OF SERVICE


I, R. Booth Goodwin II, hereby certify that I have served a true and correct copy of the foregoing WVP DEFENDANTS' MOTION TO DISMISS on this 5th day of December, 2016, via U.S. Mail, postage prepaid, as follows:

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December 5, 2016

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Kanawha County Circuit Court  
111 Court Street  
Charleston, WV 25301


Re: *WV Department of Transportation and Division of Highways,*  
*vs. WV Paving, Inc., et al*  
Civil Action No. 16-C-1541

Dear Ms. Gatson:

Enclosed please find the "WVP Defendants' Motion to Dismiss" in the above-styled action. Please file in accordance with your normal filing procedure.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



R. Booth Goodwin II

RBG/tw  
Enclosure  
cc: Counsel of Record